

In the

Supreme Court of the United States

LARRY C. FLYNT, JIMMY R. FLYNT
AND ALTHEA LEASURE FLYNT,

PETITIONERS,

V.

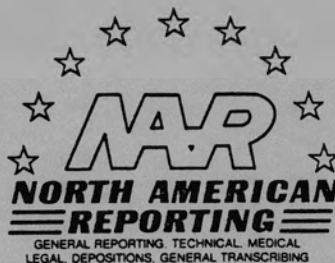
OHIO

No. 80-420

Washington, D.C.
March 24, 1981

Pages 1 thru 56

ORIGINAL



202/544-1144

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - :
3 LARRY C. FLYNT, JIMMY R. FLYNT :
4 AND ALTHEA LEASURE FLYNT, :

5 Petitioners, :

6 No. 80-420

7 v. :

8 OHIO :
9 - - - - - :
10

11 Washington, D. C.

12 Tuesday, March 24, 1981

13 The above-entitled matter came on for oral ar-
14 gument before the Supreme Court of the United States
15 at 10:14 o'clock a.m.

16 APPEARANCES:

17 HERALD PRICE FAHRINGER, ESQ., Lipsitz, Green, Fah-
18 ringer, Roll, Schuller and James, One Niagara
19 Square, Buffalo, New York 14202; on behalf of
20 the Petitioners.

21 BRUCE A. TAYLOR, ESQ., 440 Leader Building, Cleveland,
22 Ohio 44114; on behalf of the Respondent.

23 ANDREW J. LEVANDER, ESQ., Assistant to the Solicitor
24 General of the United States, U.S. Department of
25 Justice, Washington, D.C. 20530; on behalf of the
United States as amicus curiae.

MILLERS FALLS
ERASE
COTTON CONTENT

C O N T E N T S

ORAL ARGUMENT OF

PAGE

HERALD PRICE FAHRINGER, ESQ.,
on behalf of the Petitioners

3

BRUCE A TAYLOR, ESQ.,
on behalf of the Respondent

28

ANDREW J. LEVANDER, ESQ.,
on behalf of the United States as amicus curiae

45

HERALD PRICE FAHRINGER, ESQ.,
on behalf of the Petitioners -- Rebuttal

54

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in Flynt v. Ohio.

Mr. Fahringer, you may proceed now.

ORAL ARGUMENT OF HERALD PRICE FAHRINGER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. FAHRINGER: Mr. Chief Justice, and if it please the Court:

This case is here on certiorari to the Supreme Court of Ohio. The resolution, the question, posed by this case which is of constitutional dimension and, I believe, one of first impression, is bound to carry implications and give directions far beyond the boundaries of this case. And that simple question, as I view it, is this: where a defendant in a criminal case makes out a prima facie case of selective prosecution, is it sufficient for the prosecutor to simply deny those allegations and suggest or intimate that this was a test case?

QUESTION: Mr. Fahringer, might I interrupt you for a moment? I realize that you're just beginning, but as you are undoubtedly aware, our jurisdiction over appeals for certiorari from the highest courts of states is governed by 28 USC 1257, which requires a final judgment or decree. As I understand the Supreme Court of Ohio opinion here, it simply remanded the case for trial. It didn't affirm a conviction.

1 Your client has never been tried. Why is this a final judg-
2 ment or decree?

3 MR. FAHRINGER: Well, Your Honor, I believe under
4 that Section -- and I'm not sure if it is a final judgment or
5 decree, but under that Section you've invoked your power in
6 First Amendment cases, which this is, as the Government
7 acknowledges in their brief, on a number of occasions because
8 of the importance of the issue. We believe, in view of the
9 controversy that has been generated by this case, it would be
10 well now to resolve this issue because of its widespread
11 importance.

12 QUESTION: Do you think that 1257 is just an open-
13 ended thing, then? If we think the issue is important, that
14 we can take it regardless of the language used by the
15 Congress?

16 MR. FAHRINGER: Well, I think you have in the past
17 done that in a number of cases involving injunctions and mat-
18 ters of that kind, which I believe this is. We come well within reach
19 of those cases. And I would beseech you to invoke your juris-
20 diction under that inherent power you have because of the
21 importance of the issue.

22 QUESTION: Do we -- we don't have any inherent
23 power. We have the power to interpret the statutory language.

24 MR. FAHRINGER: Your Honor, I just am of the view
25 that, as the cases relied upon in the amicus brief where

1 they indicate you have done this before, where there has not
2 been a final judgment, is -- we are a good candidate for that
3 type of disposition.

4 The facts to be introduced to the Court in a rather
5 summary fashion -- I know you are aware of them, but I'd
6 like to just simply highlight. In the hearing conducted in
7 Cleveland, we established and it is conceded by all that
8 Hustler Magazine was the only magazine prosecuted, although
9 there were many other magazines similar to it, comparable to
10 it, and in one point, the prosecution even conceded more
11 explicit than Hustler.

12 We also established that at least, at the very
13 least, the investigation was launched because of a political
14 cartoon which disparaged the President of the United States
15 and a member of his Cabinet and Governor Rockefeller. And at
16 the very most, the prosecutor conceded during the hearing
17 that it was one of the reasons why the prosecution was ini-
18 tiated, even though he said later on that upon examination
19 of the magazine --

20 QUESTION: On the practical side of things,
21 Mr. Fahringer, what does a prosecutor do when he's going to
22 test a statute? Does he pick out the weakest case in sight
23 or the strongest, the strongest defendant or the most vul-
24 nerable defendant?

25 MR. FAHRINGER: Absolutely not. He would pick the

1 strongest, Your Honor.

2 QUESTION: Certainly, and the most vulnerable defen-
3 dant.

4 MR. FAHRINGER: Absolutely, Your Honor. But I
5 don't believe --

6 QUESTION: What did the highest court of the state
7 say about this issue?

8 MR. FAHRINGER: Well, Your Honor, they said -- and
9 this brings us to a very important issue in this case -- they
10 said we did not make out a prima facie case and that we had --

11 QUESTION: Are we not bound by that?

12 MR. FAHRINGER: I don't believe you are, Your
13 Honor. If we were bound by anything in this case, it would
14 seem to me, and we urge it in the second branch of our brief,
15 that you are bound by the trial judge's findings. The Ohio
16 law is well established that great weight is given to his
17 findings.

18 QUESTION: You mean the trial court prevails over
19 the highest court of the state?

20 MR. FAHRINGER: Well, Your Honor, I believe the
21 judge who hears the witnesses, observes the witnesses, has
22 been in the past, been given great deference on fact-finding
23 issues, and all I'm suggesting to Your Honor is that in this
24 case where he heard the witnesses testify and was present and
25 was able to observe their demeanor, he is in a better position

1 to judge the credibility.

2 QUESTION: Well, don't we take the statement of
3 the historical facts of the case as it comes from
4 from the highest court of the state, even though it may
5 choose to disagree with the trial court?

6 MR. FAHRINGER: I don't believe you're obliged to,
7 Your Honor. I believe you have the power to go to the trial
8 court where the credibility issues were determined. Judge
9 Brown in his dissent, I believe, makes out a very persuasive
10 case citing a whole regime of cases in Ohio.

11 QUESTION: Well, but the very fact that he was in
12 dissent means that the majority didn't agree with him.

13 MR. FAHRINGER: No question about it, Your Honor.
14 What I'm impressed by with Judge Brown is the authorities
15 that he assembled in his dissent from the highest court of
16 Ohio indicating that we have traditionally in this state on
17 matters of credibility given weight to the trial judge's
18 disposition because of his unique position to make that
19 judgment. But Your Honor, I really don't believe in a sense
20 this case, you know, has to go off on that issue. It seems to
21 me that we clearly made out a prima facie case here no matter
22 how you examine these facts, and --

23 QUESTION: For the purposes of what? Your federal
24 constitutional claim?

25 MR. FARHINGER: Yes, Your Honor.

1 QUESTION: What is your federal constitutional
2 claim?

3 MR. FAHRINGER: Our federal constitutional claim
4 is we've been denied equal protection here under the Four-
5 teenth Amendment, because we were singled out --

6 QUESTION: It isn't a matter of due process?

7 MR. FAHRINGER: Well, I think it is in terms of the
8 burden of proof it's a matter of due process, Your Honor.
9 I think the two rights coincide. Our substantive right is
10 one of equal protection. Our due process claim is whether
11 or not when the Supreme Court of Ohio says, after having made
12 out the case we did in the lower court, that we were obliged
13 to bring forward the officials to show that they were or
14 were not going to prosecute the other magazines.

15 QUESTION: Do you have some equal protection cases
16 where we've in the name of making a constitutional judgment
17 made our own judgment of the historical facts?

18 MR. FAHRINGER: Well, Your Honor, what I think we
19 have here is, we have a long line of cases from this Court
20 where you have given great weight to the findings --

21 QUESTION: Of district courts, maybe, but this
22 comes from a state court, as Justice Rehnquist says.

23 MR. FAHRINGER: Well, Your Honor, forgive me, but
24 I don't believe there should be any difference in this Court
25 in judging the factfinding process of a district court or of

1 a state trial court.

2 QUESTION: Well, but, Congress may have suggested
3 that there should be. All we can review in the state court
4 proceedings is questions of violations of federal or consti-
5 tutional rights.

6 MR. FAHRINGER: Well, Your Honor, let me just say
7 this. Depending on your disposition on that issue, my view
8 is that the wrong rule was applied here and I'd like to
9 address that.

10 It seems to me that when you have a case of this
11 kind where a monopoly of the evidence exists with the
12 Government, as in the prosecutorial vindictiveness cases and
13 in the exclusion of cognizable minority groups from juries,
14 this Court has said, dealing both with state cases and with
15 federal cases, that a different rule has to be applied.
16 Obviously in these cases the defendant is placed at a dis-
17 tinct disadvantage in terms of trying to -- we never had any
18 expectation for one moment in this case that my cross-examina-
19 tion would cause Mr. Taylor to break down and say, yes, yes,
20 I did it, this was the selected prosecution. In every case
21 that has come to this Court or has come to the circuit courts
22 under selected prosecution, it is understandable that the
23 prosecutor who bears the responsibility for this act has taken
24 a defensive posture and has explained away the reason if -- it
25 seems to me, if this case were to survive, every single

1 selected prosecution case in the country could be defeated
2 by the prosecutor saying, we decided this was a test case.

3 QUESTION: Is it possible to have a test case that's
4 not selective?

5 MR. FAHRINGER: Of course, Your Honor. Of course.
6 As a matter of fact, I welcome that question. In Atlanta,
7 Georgia, in the cases cited in the prosecutor's brief, where
8 they did exactly the same thing, they made a judgment in
9 Atlanta, Georgia -- this case reached the 5th Circuit -- they
10 made it a judgment that they were going to proceed against
11 the so-called sophisticated men's magazines, to put it as
12 gracefully as I can, and there they went after five or six.
13 And many of those, Your Honor, were out-of-state. As a
14 matter of fact, they were all out-of-state there and they
15 used their extradition powers to bring all of those publishers
16 into the state and they prosecuted Penthouse, they prosecuted
17 Hustler, they prosecuted Playboy, they prosecuted Club magazine,
18 and a number of others.

19 QUESTION: I said, my question was, where you have
20 a one single, a test case, isn't that obviously a selective
21 case?

22 MR. FAHRINGER: Absolutely. There's no question
23 about it, Your Honor.

24 QUESTION: What's wrong with it?

25 MR. FAHRINGER: Well, what is wrong with it is,

1 here, Your Honor, I think it is inherently suspect. Let's
2 look at the facts. They acknowledge, the prosecutor acknow-
3 ledges that he stated on public television, that this case is
4 being prosecuted because of the political cartoon. We know
5 that the initial investigation was launched by the cartoon
6 because of the complaints that were made against it.

7 Now, it seems to me more than coincidental at that
8 point, after Hustler has been in that community for two years,
9 they had 550 obscenity prosecutions, not one has ever in-
10 volved a sophisticated men's magazine, and all of a sudden,
11 coincidentally with that, they made a judgment that we are
12 going to proceed against Hustler on obscenity grounds.

13 QUESTION: Are you suggesting that by putting one
14 political cartoon in an otherwise pornographic publication,
15 the publisher insulates himself from prosecution under the
16 First Amendment?

17 MR. FAHRINGER: Absolutely not, Your Honor.

18 QUESTION: Then what's the significance of the
19 political cartoon that you mentioned?

20 MR. FAHRINGER: Because that's what inspired the
21 prosecution, Your Honor, I say in all deference to the Court.

22 QUESTION: Did the highest court of Ohio say some-
23 thing about that?

24 MR. FAHRINGER: No, Your Honor, what the highest
25 court of Ohio said was this: it is conceded that Hustler

1 was selected so under the --

2 QUESTION: Of course, as Justice Marshall just sug-
3 gested, the prosecutor always selects, and you have conceded
4 that if he knows his business he's going to select the
5 strongest case for the prosecution and the most vulnerable
6 defendant. Is that not -- ?

7 MR. FAHRINGER: Your Honor, I welcome that question
8 because I think that goes to the very heart of the issue here
9 and let me deal with it. It seems to me under the well-
10 established law we have to satisfy two branches of the test
11 that has been fixed by this Court and other courts. One is
12 that we've been singled out. And all I'm saying is that that's
13 been conceded by everyone, because they didn't prosecute any
14 other magazines. Now, the hard part of the case is, did they
15 single us out for an impermissible reason? We have prima
16 facie --

17 QUESTION: What's the impermissible reason here?

18 MR. FAHRINGER: The cartoon.

19 QUESTION: Then we come back to the proposition that
20 by printing one political cartoon the publisher's going to
21 be insulated from prosecution.

22 MR. FAHRINGER: No, no, Your Honor, I'm not sug-
23 gesting that and let me try to make myself clear to you.
24 I'm not saying that the magazine can be salvaged on obscenity
25 grounds, because of that cartoon. What I'm saying is, where

1 it is clear from the evidence that at least the investigation
2 was initiated by that cartoon, this Court has to take a hard
3 look at a retraction of that and at the hearing when obviously
4 you have an issue now, in an adversary forum, where the
5 prosecutor comes in and says, well, that really wasn't our
6 reason, but we decided to make a test case of this.

7 The other thing I would urge upon this Court is,
8 otherwise it seems to me the doctrine of selective prosecu-
9 tion will become a myth.

10 QUESTION: Mr. Fahringer, what in your opinion, if
11 you had to pick one case from this Court on the question of
12 selective prosecution, is the closest one that supports you?

13 MR. FAHRINGER: Your Honor, I would like to answer
14 that question by saying that the rule that I would like to --

15 QUESTION: No, I'm not asking you to -- I've asked
16 you for the case.

17 MR. FAHRINGER: I'm sorry. I was going to do that.
18 I think the Falk case out of the 7th Circuit.

19 QUESTION: From this Court, I asked.

20 MR. FAHRINGER: Judge, there is no case directly in point
21 in this Court. What you have done is, in this Court, under Yick Wo,
22 Oyler, and Two Guys, you have established the substantive
23 rules. And I didn't mean to evade your question. What I'm
24 saying is that you have never addressed what I consider to be the
25 primary issue, the procedure, the implementing of the rule.

1 After you announced the rule in exclusion of cogniza-
2 ble groups from minorities, you had a substantive principle.
3 In Castaneda you then had to decide how you were going to
4 implicate this, because what had happened is, jury commis-
5 sioners were coming into courts and saying, we never had any
6 intent to exclude Mexicans or blacks, and yet, in what I
7 consider to be a critically important footnote in Castaneda,
8 Footnote No. 19, the Court said, and the language is important
9 enough that I'd just recite it to you, it's very short.
10 What you said is, "This is not to say, of course, that a sim-
11 ple protestation from a commissioner that racial considera-
12 tions played no part in the selection would be enough. This
13 kind of testimony has been found insufficient in several
14 cases. Neither is the state entitled to rely on a presump-
15 tion that officials discharge their sworn duties to rebut
16 the case of discrimination." There you have, in that in-
17 stance, plaintiffs who have shown a discrimination against a
18 cognizable minority group. The commissioners come in just
19 like the prosecutor does here and says, we never intended
20 that, and that it's not our purpose to discriminate against
21 Mexicans. And this Court has said that because of the unique
22 circumstances of those cases, we are going to require a
23 heavier burden of proof and they will have to produce more.
24 In Blackledge v. Perry -- and Your Honor, perhaps I should
25 have responded --

1 QUESTION: Do you think the prosecutor was preju-
2 diced against your client?

3 MR. FAHRINGER: Beg your pardon?

4 QUESTION: Do you consider the prosecutor as being
5 prejudiced against your client?

6 MR. FAHRINGER: I can't say that in good conscience,
7 Your Honor, but what I can --

8 QUESTION: Well, what's the whole argument? All
9 the argument you're saying is where they're prejudiced against
10 a group of people. This prosecutor was prejudiced against
11 a group of people or an individual.

12 MR. FARHINGER: Well, Your Honor, I think --

13 QUESTION: Is he?

14 MR. FAHRINGER: Well, to the extent that he was
15 very much offended by the cartoon, yes, he would be prejudiced
16 against my client. I have no --

17 QUESTION: Is that the same as racial prejudice?

18 MR. FAHRINGER: Well, I think, Your Honor, it's --

19 QUESTION: Well, if so, which section of the Consti-
20 tution protects it?

21 MR. FAHRINGER: Well, what protects us is, Your
22 Honor, the First Amendment, in terms of the --

23 QUESTION: You said you were relying on the Four-
24 teenth Amendment.

25 MR. FAHRINGER: Well, I am, Your Honor, but what

1 you have is, it seems to me, is a coalescence of the Four-
2 teenth Amendment on equal protection but the impermissible
3 basis for prosecuting us is the First Amendment. We --

4 QUESTION: Won't that be a matter of the merits of
5 the trial? You'll have a defense under the First and Four-
6 teenth Amendments on the merits at the trial, of the prose-
7 cution. And then, since I've already interrupted you, why
8 isn't-- in a system of adversary criminal justice such as we
9 have, entrusting so much unreviewable and uncontrollable dis-
10 cretion to a prosecutor, why isn't, as the Chief Justice and
11 my brother Marshall have suggested -- why isn't any prosecu-
12 tion a selective prosecution?

13 MR. FAHRINGER: Well, Your Honor, I --

14 QUESTION: And I must say this, the great discre-
15 tion, unreviewable and uncontrollable, that we confide in
16 prosecutors under our system shocks our brothers in conti-
17 nental Europe, for example. We do it.

18 MR. FAHRINGER: Well, Your Honor, I could only
19 answer that by saying that then, what you're really saying is
20 that the doctrine of selective prosecution should be abol-
21 ished.

22 QUESTION: No, no. Yick Wo was something -- Yick Wo
23 involved a statute or an ordinance in San Francisco, I guess
24 it was, that on its face applied to all laundries but in
25 practical fact it applied only to Chinese laundries.

1 MR. FAHRINGER: Yes, that's right.

2 QUESTION: And that's not this kind of a case, is
3 it?

4 MR. FAHRINGER: No, but, Your Honor, if I may, if
5 it please you, we have growing up beneath you in the circuit
6 courts Falk, you know; Steele, where they went after draft
7 protesters. And courts have found, even though the prosecu-
8 tors came in and said, look, we're making a test case of this,
9 they said, but you've picked a man here because he was very
10 active in advocating nonregistration for draft. In the
11 Steele case you had another protester. In the Crowthers case
12 here in this very city where they occupied the halls of
13 Congress and they had never prosecuted anybody that had
14 applauded the Administration, they went after only those that
15 were critical of the Administration, you said that this was
16 selective --

17 QUESTION: We didn't say it.

18 MR. FAHRINGER: I'm sorry. I beg your pardon.
19 I didn't mean to suggest you did but I would hope you would
20 have.

21 QUESTION: What about the Rico Statute? Are you
22 familiar with that, Mr. Fahringer?

23 MR. FAHRINGER: Yes.

24 QUESTION: Supposing the Government seeing the
25 statute passed for the first time and charged with the duty

1 to enforce it picks out the biggest group of mobsters that
2 it can in the country and goes after them rather than a group
3 of smaller mobsters, would you say that was a selective
4 prosecution?

5 MR. FAHRINGER: Well, Your Honor, it would be
6 selective but it might be justifiable. In other words, they
7 may not have used an impermissible standard. What I'm sug-
8 gesting in this case, and I wanted to reach this with the
9 Court because I think it's terribly important, you understand
10 that what we are faced here in this case, which I think pre-
11 sents a terrible threat to the whole doctrine of selective
12 prosecution, is a situation without one single bit of corro-
13 borative evidence, without any criteria at all, without any
14 suggestion that we had a meeting and we decided to go against
15 Hustler without any proof that we collected other magazines
16 and then we made a decision that Hustler was the worst maga-
17 zine, without a memorandum, without a report or anything.
18 After this claim is brought, and after Hustler is the only
19 magazine, a prosecutor simply takes the stand -- and I hope
20 my comments don't lack diplomacy, but I would be a coward if
21 I didn't say this -- a prosecutor takes the stand and simply
22 says, well -- he never, incidentally, never in the hearing
23 has he uttered the word, test case. What he says is, we were
24 considering maybe going after the other magazines once the
25 Hustler prosecution was concluded. Now, you may find that

1 that implies he's talking about a test case.

2 But I come back to this issue and I challenge my
3 brothers to answer this. If this were the law in the context
4 of this case right now, would you all agree with me that
5 any selective prosecution claim could be defeated, could
6 be defeated by simply the prosecutor taking the stand and
7 saying, this is a test case?

8 QUESTION: What would happen if the prosecutor
9 prosecuted another magazine? Right now?

10 MR. FAHRINGER: Well, Your Honor, significantly,
11 none have been prosecuted but --

12 QUESTION: You heard my question.

13 MR. FAHRINGER: Judge, if they had prosecuted --
14 Your Honor --

15 QUESTION: I said, as of right now they prosecuted
16 another one?

17 MR. FAHRINGER: You mean, right this minute?

18 QUESTION: Yes, sir.

19 MR. FAHRINGER: I would think that would --

20 QUESTION: Would that solve the problem?

21 MR. FAHRINGER: I do not believe it would solve
22 the problem, Your Honor, but I think it would --

23 QUESTION: Would that end your case?

24 MR. FARHINGER: I don't believe so, Your Honor.

25 QUESTION: Why not?

1 MR. FAHRINGER: Because I think that --

2 QUESTION: And suppose they filed six suits against
3 six magazines?

4 MR. FAHRINGER: If they had done that after this --

5 QUESTION: If they do it right now, would that
6 solve your problem?

7 MR. FAHRINGER: Your Honor, I think that would add
8 greatly to their case load.

9 QUESTION: So there's nothing that the Government
10 can do now but turn your man loose.

11 MR. FAHRINGER: Your Honor, I think the posture
12 we're in here is that the facts are fairly well fixed.
13 I think our concern always is what they do in retrospect can
14 be interpreted in terms of simply trying to defeat the claim
15 but, Your Honor, I would be the first to admit to you and
16 acknowledge that if right after the Flynt prosecution they
17 had gone out, even after the claim had been brought to their
18 attention, and charged five or six other men's magazines, it
19 would well be that we wouldn't be in this court today.

20 QUESTION: Well, wouldn't they have a complaint?

21 MR. FAHRINGER: Beg pardon?

22 QUESTION: Wouldn't they have a complaint that
23 they had been selected out?

24 MR. FAHRINGER: Well, Your Honor, I think in propor-
25 tions of each. I mean, if they go after --

1 QUESTION: I mean, they get out of this. I don't know,
2 things have changed, but I thought in law school we were
3 taught that if a prosecutor did not prosecute, the Good Lord
4 couldn't do anything to him.

5 MR. FAHRINGER: Well, I don't think that's --

6 QUESTION: There is nobody else. I thought that's
7 what the law was.

8 MR. FAHRINGER: The doctrine of selective prosecu-
9 tion seems to militate against that, Your Honor. Obviously,
10 the rule --

11 QUESTION: In the first place, Yick Wo v. Hopkins
12 was not a selective prosecution case, that you rely on so
13 dearly. It was an ordinance that was deliberately passed,
14 and this Court so found.

15 MR. FAHRINGER: I understand that, Your Honor, but
16 what I'm saying is --

17 QUESTION: That doesn't help you. Now what case
18 helps you on selective prosecution?

19 MR. FAHRINGER: Well, I think, Your Honor, I was
20 going to say, in response to Judge Rehnquist's question, the
21 case of Blackledge v. Perry, which is a prosecutorial vindic-
22 tiveness case, but is in the close neighborhood of what we're
23 talking about here. And the Court there said, this Court
24 went further than the circuits did in Falk, Steele, Crowthers,
25 and Berrios by holding that due process is violated where

1 there is prosecutorial opportunity for vindictiveness, even
2 when there is no evidence that the prosecutor acted in bad
3 faith or maliciously. What I am urging by analogy is, in a
4 very close situation where you have prosecutorial vindictive-
5 ness rather than selectivity, and I see them closely allied,
6 this Court recognizing the difficulty of proof that the
7 defendant has, says in those cases if there's appearance of
8 vindictiveness, an opportunity for vindictiveness, then a
9 very heavy burden shifts to the Government to come forward --

10 QUESTION: What would happen if in a hypothetical
11 case a prosecutor prosecuted a man for murder with 86 eye-
12 witnesses, but it was shown that they were bitter enemies,
13 the prosecutor and the man involved? Would that man go free?

14 MR. FAHRINGER: Well, no, Your Honor, because, first
15 of all, he's the only one that has committed the murder so
16 he hasn't been selected out, it seems to me.

17 QUESTION: I don't know what town there only has had
18 one murder.

19 MR. FAHRINGER: Well, what I'm saying is, Your
20 Honor, I assume he'd been properly connected with the murder
21 but secondly, it would seem to me that we would have to
22 evaluate whether it was for an impermissible or unconstitu-
23 tional purpose. What we're saying here in this case is --

24 QUESTION: Well, we don't know yet whether this
25 man's committed a crime, do we?

1 MR. FAHRINGER: You mean in your example you've
2 given, Your Honor?

3 QUESTION: No, sir, in this case.

4 MR. FAHRINGER: We do not, Your Honor.

5 QUESTION: You don't want to find out, do you?

6 MR. FAHRINGER: Well, Your Honor, I just am criti-
7 cal of the fashion in which the -- I think, Your Honor,
8 rightly or wrongly, that these procedures represent a very
9 real threat to the First Amendment. It's a matter of record,
10 Your Honor, that the minute this prosecution was initiated
11 against Mr. Flynt, the major distributor in that community
12 would no longer handle his magazine. The prosecutor wrote him
13 and said, we are considering starting a criminal action against
14 him and if we do, will you discontinue handling his magazine?
15 And he said, yes. And so the minute the action was started,
16 George Kline, the major distributor in Cleveland, no longer
17 handled it. This Court has always been extremely sensitive
18 to the chilling effect of prosecutions of this kind which in-
19 volve the distribution of magazines which are presumably
20 protected. As a matter of fact, I don't know why the unbro-
21 ken series of cases that stretch over a long history of this
22 Court, they have always held postulate that where you
23 have a restraint, a prior restraint of the nature you have
24 here, that comes to this Court, it comes bearing a presump-
25 tion of unconstitutionality. It seems to me --

1 QUESTION: Mr. Fahringer, could I interrupt you
2 for a moment?

3 MR. FAHRINGER: Yes, sir.

4 QUESTION: Your argument, as I understand it, is
5 it's got two elements. One, one of a large number of people
6 that are basically the same is selected for prosecution; and
7 secondly, the reason for it was that he published a political
8 cartoon which would be an impermissible reason. Then you
9 say the burden shifts to the prosecution to -- what would the
10 prosecution have to do to justify that kind of selectivity?

11 MR. FAHRINGER: I think that's an excellent ques-
12 tion, Your Honor, and I welcome it. I think what we really
13 should have had is, number one, he should have called his
14 superiors in. The Supreme Court of Ohio --

15 QUESTION: Why did he have to call his superiors
16 in? He had the authority to bring prosecutions, I thought.

17 MR. FAHRINGER: Well, but at the end he said he
18 didn't, Your Honor. Now, I find that an inconsistency. You
19 remember, in the beginning he says he's in charge but at the
20 very end he said, well, he had to check with his superiors about
21 the other magazines. Now, for some reason the Supreme Court
22 in -- I consider this terribly important procedurally -- the
23 Supreme Court said the reason we failed in making out our
24 prima facie case is that we should have brought those persons
25 in from the prosecutor's office and put them on the stand and

1 inquired of them.

2 QUESTION: Well, what would you ask them?

3 MR. FAHRINGER: Well, what I would do is, I would
4 say, has there been any consideration given to these other
5 magazines?

6 QUESTION: Well, he already told you, no, on that.
7 There was no consideration of prosecuting anybody but Hustler,
8 as I understand it.

9 MR. FAHRINGER: But, Your Honor, what he said --

10 QUESTION: And the reason they picked Hustler was
11 that Hustler, they say, had a head office in Ohio.

12 MR. FAHRINGER: Well, Your Honor --

13 QUESTION: Don't you have to at least address the
14 question of whether that's an adequate justification for
15 selecting them out?

16 MR. FAHRINGER: I don't believe it is, Your Honor.
17 Because --

18 QUESTION: Why not?

19 MR. FAHRINGER: -- as they concede in their brief,
20 they were mistaken when they said they couldn't bring people
21 in from out of state. The extradition law, as a matter of
22 fact, Section -- I believe it is 2903 of the State of Ohio
23 Laws says -- 2963.01 through 2963.29 provides that they
24 can extradite for misdemeanors, so that he was mistaken in
25 that assumption, so he could have gone after all of the

1 sophisticated men's magazines and brought all of the people
2 in from out of state. But, Your Honor, the point I make is,
3 it seems to me the very least we're entitled to is some
4 corroboration of a meeting, of a discussion about evaluating
5 these other magazines and the purchase of those magazines. .
6 The police officers went out and got Penthouse and these
7 other magazines and brought them in, and then if they had
8 said, we made a decision that Hustler is the magazine we're
9 going to go after, then it would seem to me they may well
10 have met their burden.

11 QUESTION: Didn't they make that decision when they
12 brought the charges?

13 MR. FAHRINGER: Judge, I don't believe --

14 QUESTION: What law, what case ever said that he's
15 got to articulate his reasons?

16 MR. FAHRINGER: Well, I read that into -- again,
17 Your Honor, I'm very impressed with the Falk decision out of
18 the 7th Circuit where they say that once, in a First Amendment
19 case, once a prima facie case is made out, the evidence must
20 be compelling and that the Government has a heavy burden. And
21 I think that implies more than just a categorical denial:
22 we did no wrong, that we did what we thought was right.
23 And, Your Honor, it would seem to me, again --

24 QUESTION: Do you read Falk as a constitutional
25 case? It was a federal prosecution. Do you read Falk as a

1 constitutional holding?

2 MR. FAHRINGER: Yes, I do.

3 QUESTION: You do.

4 MR. FAHRINGER: I don't think, Your Honor, in this
5 area where you involve both the First Amendment and the Four-
6 teenth Amendment, that it makes any difference whether we're
7 in the federal jurisdiction or in the state jurisdiction.
8 I would see this Court handing down a rule that would cover
9 selective prosecution both in state courts and in federal
10 courts. My time is about expired, but let me just end on
11 this note at the risk of being repetitive.

12 I think the matter the Court should be the most
13 concerned about is, if this selective prosecution were to be
14 sustained on the record that is below, then it seems to me
15 we will have done irreparable damage to that doctrine if it
16 is to survive and remain viable, because basically what
17 could happen in any selective prosecution across the country,
18 a prosecutor could simply come in and say, one, we never in-
19 tended to discriminate against this defendant; and we may go
20 after some of the other defendants later on; and, number three,
21 we view this as a test case. If that's the situation, then
22 we run a terrible risk of every single selective prosecution
23 being defeated and that the doctrine will be relegated to
24 a legal museum. Thank you very much.

25 MR. CHIEF JUSTICE BURGER: Mr. Taylor.

1 ORAL ARGUMENT OF BRUCE A. TAYLOR, ESQ.,

2 ON BEHALF OF THE RESPONDENT

3 MR. TAYLOR: Mr. Chief Justice, and may it please
4 the Court:

5 I first would like to make a comment on jurisdic-
6 tion. Usually the state prosecutors who appear in the federal
7 courts, whether it be this Court or district courts, commonly in
8 1983 actions, the state is usually in reluctance to submit to
9 federal jurisdiction. However, I think that the procedural
10 aspect of this case makes it different than other types of
11 cases where this Court has determined whether or not the
12 finality rule is subject to an exception bringing a case up
13 here that's interlocutory in nature or whether there are fur-
14 ther proceedings which can be happening in the lower court
15 on remand. The difference is that in this case we have a
16 prosecutor's appeal. We have brought Larry Flynt and his
17 brother and his wife here against their will, as it were.
18 There should be a distinction made by this Court in determin-
19 ing jurisdiction between cases where the prosecutor loses in
20 the trial court on his motion to dismiss for selective prose-
21 cution, as it is in double jeopardy.

22 On the contrary, the cases where the defendant wins
23 his motion and the prosecutor appeals -- the prosecutor has
24 the right to appeal, by statute, in Ohio. We have to ask
25 leave of court, from the Court of Appeals, and then it can go

1 further up to the Supreme Court of the state.

2 One of the requirements of 1257 is that it be a
3 final judgment or a decree of the highest court of the state.
4 Therefore, when you talk about a final decree, the Supreme
5 Court of Ohio has, in effect, taken a ruling which in the
6 trial court level applied only to Larry Flynt and his brother
7 and his wife, and it has broadened it into a statewide policy
8 cementing in stone the rule of law in Ohio, as the Supreme
9 Court of Ohio sees your decisions on selective enforcement.
10 They have in effect made it for everybody.

11 QUESTION: 1257 certainly doesn't make any such
12 distinction, does it?

13 MR. TAYLOR: No, and I reluctantly have to say, not
14 that I agree that the Court should have taken the case.
15 Generally the Court should supervise all state court rulings
16 in this area. But because of the rulings this Court has made
17 in cases like Cox Broadcasting v. Cohn, and Radio Station WOW,
18 the Construction Workers v. Curry, all those cases where this
19 Court has said, in effect, those cases were when state courts
20 had said, we have jurisdiction over a federal type claim,
21 ICC claim or one of those kinds of things where the Federal
22 Government has the jurisdiction usually.

23 QUESTION: Are you arguing that the judgment of the
24 supreme Court of Ohio is final within 1257 or that we ought
25 to carve an exception to the finality rule?

1 MR. TAYLOR: No, I think that --

2 QUESTION: Which is it? The first?

3 MR. TAYLOR: It's the second, Your Honor.

4 QUESTION: It's an exception?

5 MR. TAYLOR: It's an exception. I think that --

6 QUESTION: Within other cases where we've --

7 MR. TAYLOR: Yes, I feel, what I'm saying --

8 QUESTION: What cases does it fall within?

9 MR. TAYLOR: It falls under, I think, the broaden-
10 ing that you did in Cox, in Construction Laborers v. Curry
11 and in Mercantile Bank v. Langdeau.

12 QUESTION: Well, but we didn't purport to carve
13 out an exception to the statutory rule. We don't have any
14 power to do that.

15 MR. TAYLOR: Not an exception to the rule.

16 QUESTION: The rule gives us jurisdiction only from
17 final judgments of the highest courts of the state in which
18 the decision was made, and therefore the Cox case and the
19 other cases on which you rely simply said that the judgment
20 was final, within the meaning of the rule, within the meaning
21 of the statute. It wasn't an exception to the statute. We
22 haven't got any power to do that.

23 MR. TAYLOR: Well, by exception, this Court has
24 discussed it as if it were an exception by saying, even though
25 we have discussed finality in terms of nothing further to

1 happen in the trial court, we have on occasion said that when
2 something further happens in the trial court but it is of
3 no practical significance to the issue decided, that is in
4 effect a final judgment.

5 QUESTION: That certainly isn't this case. What
6 has to go on in the trial court is of great significance.

7 QUESTION: Yes, and it might end with a judgment
8 of not guilty. And then any decision we should have made in
9 this case on the merits would simply be no more than an
10 advisory opinion.

11 MR. TAYLOR: No, Your Honor, because it doesn't go
12 away. If the Supreme Court of Ohio's decision --

13 QUESTION: It does go away entirely with respect
14 to these petitioners if they were found not guilty.

15 MR. TAYLOR: Yes, but that's why I said, the dif-
16 ference between this case and other cases is that here --

17 QUESTION: This Court is here to decide cases and
18 controversies, not to make policy.

19 MR. TAYLOR: But our Supreme Court has already made
20 policy, but because a prosecutor has the right to appeal,
21 if this Court does not review the Supreme Court of Ohio's
22 case and Larry Flynt is acquitted or we don't prosecute him
23 or something happens, then that ruling still applies to every-
24 body else in the --

25 QUESTION: Isn't that true of every single common

1 law jurisdiction in this country, 49 states, that a judgment
2 of the highest court of a state, although it's cast in terms
3 of A versus B, it lays down a rule of law that's applicable
4 to all parties similarly situated.

5 MR. TAYLOR: Yes, Your Honor, it generally does.
6 I just meant to comment on jurisdiction only because I feel
7 that this Court's, you know, decisions in some of those cases
8 has made the finality rule broad enough to include what we
9 have here. We have a case where there are further proceed-
10 ings but that's First Amendment and there are lots of cases
11 of this Court -- I'm not saying this Court has or does not
12 or should keep this case or not, but I feel there's a much
13 broader distinction.

14 QUESTION: Mr. Taylor, at the trial that follows
15 -- assume that the trial does take place in this case, may
16 the defendants again argue that the prosecution should be
17 terminated because he was selected out for an impermissible
18 reason?

19 MR. TAYLOR: Yes, Your Honor.

20 QUESTION: He can do that at the trial?

21 MR. TAYLOR: Well, he has to preserve the record,
22 obviously. He has to make, he has to reserve his exceptions,
23 but obviously --

24 QUESTION: But isn't that issue resolved as a mat-
25 ter of Ohio law?

1 MR. TAYLOR: Oh, yes, the trial court is bound --

2 QUESTION: You're not going to have another hearing
3 with the same witnesses during the trial that you had on the
4 issue, that was had in this case, are you?

5 MR. TAYLOR: The trial court is bound by the
6 Supreme Court's ruling, as is the Court of Appeals, so --

7 QUESTION: So that if we either dismiss the appeal
8 or affirm, the issue of selective prosecution will be totally
9 terminated in this litigation?

10 MR. TAYLOR: Yes, Your Honor. If you decide it,
11 it's terminated, although the Supreme Court of Ohio --

12 QUESTION: Or if we dismiss the appeal, either way.

13 MR. TAYLOR: Right. Although --

14 QUESTION: And the prosecution would go forward on
15 other issues.

16 MR. TAYLOR: Okay. Well, I want to make it clear
17 that my position is that this Court --

18 QUESTION: If this case goes to trial and the defen-
19 dant is convicted, you're not suggesting that under Ohio law
20 he can't present on appeal to the Court of Appeals --

21 MR. TAYLOR: No, he must. Like I said, he must
22 preserve his objection and --

23 QUESTION: So he can -- the issue of selective
24 prosecution, if we dismiss this case, could survive and be
25 presented here if he's convicted?

1 MR. TAYLOR: That's correct.

2 QUESTION: Well, but it's been decided in this case
3 by the Supreme Court of Ohio.

4 MR. TAYLOR: Yes, and that's why -- your cases
5 dealing with making judicial economy and that kind of thing,
6 cutting down waste, would decide that issue now. The other
7 thing --

8 QUESTION: But if, even though the Supreme Court of
9 Ohio were to adhere to its previous ruling, as it would be
10 expected to do, opposing counsel could certainly preserve
11 the point and again petition for certiorari with a final
12 judgment if he's convicted.

13 QUESTION: Which he could have done in Cox, of
14 course, the same thing.

15 MR. TAYLOR: That's correct, and that's what I
16 mean, Cox and the other cases, I think that, you know, not-
17 withstanding the way you arrived at them, have carved out
18 the situation which I find myself in. And what I meant to ask
19 the Court is that you take note that by saying that you can
20 supervisorily decide whether the Supreme Court of Ohio cor-
21 rectly announced the law, and that should not be construed
22 by this Court or other courts that that gives the defendant
23 a correlative right to a pretrial collateral appeal if he
24 loses his motion to dismiss. And if the trial judge says, no,
25 you have to stand trial because you were not selectively

1 enforced, that should not give rise to an appeal by him be-
2 fore trial, such as was just decided by the 9th Circuit in
3 the U.S. v. Wilson case, just last month. And the U.S. 9th
4 Circuit has extended this Court's decision in Abney, which
5 said that double jeopardy in a pretrial appeal to vindictive
6 prosecutions, and now they've said vindictive prosecutions
7 are the same as selective prosecutions. And I think this
8 Court should be wary of the distinction and that's the only
9 point I meant to make on jurisdiction.

10 QUESTION: Well, didn't we in our MacDonald say that
11 speedy trial claims were not governed even within the federal
12 system by Abney?

13 MR. TAYLOR: Yes, and I think that we are closer to
14 -- the defendant's losing his motion at trial is governed
15 by that case rather than Abney. Abney was decided because of
16 the peculiarity of the double jeopardy history and because of
17 the significance of that claim. I don't think selective
18 prosecution or vindictive prosecution or losing any evidence
19 question, motion to suppress, should be allowed, given the
20 defendant's right to a pretrial appeal. But since that could
21 be -- you know, if the Court is going to deal with jurisdic-
22 tion, I wish that it'd take a distinction between when a
23 prosecutor has the right to appeal, and your merely supervis-
24 ing whether or not the Supreme Court of Ohio made the correct
25 decision. In one way you're saying that all selective

1 prosecution cases give rise to a direct appeal or a right of
2 certiorari grant.

3 Now, as far as the merits of the case which is,
4 I think, the real allegation before us, the motive of the
5 prosecutor, I think, is important when it's clear on the facts
6 of the record that the prosecutor's vindictive. If the
7 prosecutor in Cameron v. Johnson, for instance, had enforced
8 the need for the anti-picketing statute that was passed while
9 the people were picketing the courthouse and he had picked
10 out the guy to be arrested, he had sent the cops after the
11 guy who was the leader, then I think he would have been in
12 trouble. But since they had passed a new ordinance and
13 statute and he enforced it generally, this Court said, well,
14 it's a new statute, you've got to test it. And you can't
15 say that it's invidious until you have a course of conduct.
16 I think that the course of conduct requirement where this
17 Court has said that you must prove that something happens over
18 and over again are important because, as this Court stated in
19 Sunday Lake Iron, which is a good example of a selective pro-
20 secution case, practical uniformity is the aim of the Equal
21 Protection Clause, and the emphasis, I think, is on practical.
22 And I think that the issue in this case is important to us
23 because there are two types of crimes that we must deal
24 with in the cities now. Those are the cases that come to us
25 and we have no discretion to deny or to prosecute.

1 Murders, or robberies, or assaults, those kinds of
2 crimes which happen and then there are people who are arrested,
3 we have to take those cases. The cases we have to marshal
4 our resources and decide what to do with are what we call
5 discretionary cases -- you know, the organized criminal ac-
6 tivity that's ongoing, everybody knows about it, it's fla-
7 grantly done, like obscenity, prostitution, gambling, white
8 collar crime, those kinds of things, where you know that
9 there's people violating the law and you have to decide what
10 to do about it. At this point in our history, obscenity crime
11 has become such a multimillion dollar industry that they in
12 effect have more money than we do, and as he pointed out,
13 there could be 50 magazines, 50 magazines capable of defend-
14 ing a lawsuit that the City of Cleveland could bring, who had
15 one assistant prosecutor who also, even though I did obscenity
16 cases and they were all mine, I also did all the negligent
17 homicides and I did two thousand other cases.

18 QUESTION: Mr. Taylor, can I ask you, under your
19 statute you can bring civil proceedings against these maga-
20 zines, too, can't you?

21 MR. TAYLOR: We can do both in Ohio, yes.

22 QUESTION: Has the civil injunctive power ever been
23 invoked in your jurisdiction to try and curtail this practice
24 among any of these magazines?

25 MR. TAYLOR: Your Honor, we did it once with the

1 Hustler case because we -- after we charged Hustler, we were
2 afraid that Hustler would start, you know, publishing more
3 stuff about this case and we figured if we could test it
4 not only criminally but civilly to get a judge, in effect,
5 in the Common Pleas Court to read it as obscene, that would
6 kind of help our case and it would make publicity and the
7 juries would know about it and obviously we would be able to
8 somewhat gauge the waters before the trial and whether or
9 not a judge was going to agree with us that this magazine
10 was obscene before we were going to go through a trial --

11 QUESTION: Well, as a prosecutor making the choice
12 or considering the choice between a civil injunction suit
13 under criminal prosecution, would you take into account the
14 rather stringent attitude this Court has expressed on prior
15 restraint of publications?

16 MR. TAYLOR: Well, yes, and the reasons -- an in-
17 junction statute, to answer both questions, is very imprac-
18 tical. It's useless for magazine cases. It's okay for film
19 cases but only the kinds of film cases which are going to
20 play for a month. If Deep Throat comes to Cleveland, they're
21 going to want to show it a long time to get their money back.
22 Well, if you got an injunction after seven or ten days, that
23 would have some effect. But the peep shows where you put a
24 quarter in and see a movie and there's 14 movie projectors in
25 a booth or a magazine rack where every single month

1 50 different issues come out, well, getting an injunction ten
2 days later on one magazine's not going to do any good. They
3 can bring a truckload in and replace it. As a practical
4 matter, nobody in this country is prosecuting magazines under
5 the civil injunction statute because it doesn't have any
6 individual effect.

7 QUESTION: What happened to your injunction suit
8 against Hustler?

9 MR. TAYLOR: We filed it in the Court of Common
10 Pleas. We had a discussion on discriminatory prosecution,
11 and the trial judge issued a temporary injunction for 14 days
12 and they filed to the Court of Appeals on a writ of mandate
13 and the Court of Appeals denied the writ of mandate and the
14 defendants dissolved their appeal, they dismissed their appeal
15 and did not appeal the trial court's decision on the injunc-
16 tion. They just let it lie because by that time a new monthly
17 issue was ready to come out, I think. I mean, I can't speak
18 for them, but they did dissolve the issue as soon as it hap-
19 pened --

20 QUESTION: Was that case involving the same issue
21 as the one with the political cartoon in it?

22 MR. TAYLOR: No. We prosecuted on the July and
23 August issues and we did it civilly on the September issue.

24 QUESTION: What is your position on the selective
25 prosecution issue? Is it your view that if you were to

1 acknowledge that the reason you chose Hustler was because of
2 this cartoon, would that be a permissible or an impermissible
3 reason in your view?

4 MR. TAYLOR: Well, it could be permissible. When
5 I argue this case to the jury, if it goes to the jury, I'm
6 going to say --

7 QUESTION: Well, now, you're arguing to this
8 Court today, not to -- ?

9 MR. TAYLOR: Well, to this Court --

10 QUESTION: Do you think it's a permissible reason
11 to -- say you have half a dozen magazines to choose from?

12 MR. TAYLOR: No, that wouldn't be permissible, and
13 I wouldn't do that. As a matter of fact --

14 QUESTION: Does the record show that the cartoon
15 played any part in the decision to prosecute this magazine?

16 MR. TAYLOR: No, Your Honor. I think that -- we
17 tried to make it obvious although I didn't know, I wasn't
18 prepared to testify at the time when we had this hearing.
19 I just spoke what I thought was on my mind.

20 QUESTION: You say the record really supports the
21 inference that the cartoon was totally irrelevant? It would
22 have come to your attention anyway and you would have picked
23 Hustler anyway?

24 MR. TAYLOR: Of course. Well, whether or not the
25 magazine would have come to our attention, I don't know.

1 QUESTION: The trial judge didn't think that was the
2 case, did he?

3 MR. TAYLOR: No, Your Honor. This trial judge, he
4 didn't say that. What the trial judge said was that, I won't
5 take cognizance that this is the first case but I must look
6 to see that it's the only case. And therefore, a single case
7 is impermissible. He was of the view that there's no such
8 thing as a test case and that it really didn't matter if there
9 was a good reason for having one case or a bad reason. He
10 thought that, you know, selective prosecution was a question
11 of numbers, and he says so in his opinion: I am only con-
12 cerned with whether or not it's the only case on the docket,
13 and since it is I have to dismiss. He did it reluctantly.
14 Judge Calandra is one of the two judges on our court that has
15 helped the vast majority of our trials in these cases, and
16 rather than dismissing them or granting motions to suppress.
17 So he in his ruling, he more or less blamed it on me, in his
18 decision, saying that, you know --

19 QUESTION: Does the record tell us why, apart from
20 the cartoon, a decision was made to prosecute any of these
21 sophisticated magazines? They had been rather widely distri-
22 buted for two or three years, as I understand it.

23 MR. TAYLOR: Well, yes, for at least two or three
24 years; more than that, actually. These magazines have been
25 around for years, I guess.

1 QUESTION: What prompted the going after one of
2 this group of magazines, if it wasn't the cartoon?

3 MR. TAYLOR: Well, originally it was because the
4 police got complaints about the magazine, not only about the
5 cartoon, some --

6 QUESTION: Did they get complaints about any issues
7 that didn't have the cartoon in it?

8 MR. TAYLOR: Well, see, it was the July, '76, issue,
9 the Bicentennial issue, and it was just -- if it had been the
10 July, '75, issue, it might not have raised the stink, but it
11 did because it had a picture on the cover of a girl's bikini
12 made out of a flag and that issue probably just caused more --
13 it was more visible, so people complained about it, and they
14 really had never done that before.

15 QUESTION: And that's what triggered the prosecu-
16 tion?

17 MR. TAYLOR: Well, that's what triggered us noticing
18 the magazine. Now, we had done hundreds of prosecutions. We
19 have been to trial on --

20 QUESTION: Can you say then that there's absolutely
21 no political factors involved in selecting this magazine for
22 this prosecution?

23 MR. TAYLOR: No, Your Honor.

24 QUESTION: Well, what difference does it make what
25 triggers the prosecution?

1 MR. TAYLOR: That's what I mean --

2 QUESTION: Why have you conceded to my brother
3 Stevens what you have? The prosecution will be tried on the
4 merits in the trial, will it not?

5 MR. TAYLOR: Yes, Your Honor.

6 QUESTION: And the petitioner can assert his de-
7 fenses including the First Amendment or any other defenses
8 that he has. And what real difference does it make if the
9 prosecutor likes or doesn't like the person to be prosecuted
10 or what triggered the prosecution?

11 MR. TAYLOR: It would make a --

12 QUESTION: The merits of the prosecution will be
13 tested at the trial.

14 MR. TAYLOR: Right. It would make a difference only
15 if the prosecutor had the right and was trying to send the
16 cops after somebody, but usually it doesn't matter.

17 QUESTION: Well, under our system a prosecutor has
18 that right, unreviewable and uncontrollable, perhaps unfor-
19 tunately.

20 MR. TAYLOR: Perhaps vindictive, like it has been
21 decided in some other cases. But I think that it usually
22 doesn't matter. I mean, I should be able to pick somebody.
23 And if I say that I can arrest Larry Flynt because he lives
24 in Columbus; I can't arrest Hugh Hefner. It's going to cost
25 the City a lot of money to start prosecuting the owners of

1 other magazines --

2 QUESTION: -- call all the other magazines and
3 said, why weren't they prosecuted?

4 QUESTION: Absolutely.

5 MR. TAYLOR: Well, that's the reason. We were
6 afforded --

7 QUESTION: You'd do that at the trial, is it?

8 QUESTION: In any event, hasn't the highest court
9 of the state resolved this question by saying that there was
10 no improper selection?

11 MR. TAYLOR: Yes, and that's one of the things.
12 Not only do they say, here is the law on selective prosecu-
13 tion, go back to the trial court and apply it. They said,
14 in effect, they decided the factual issue of, yes, this is
15 not a prima facie case, the prosecutor did not discriminate,
16 he did have a valid test case. And I think that this Court
17 is bound by that portion of the Supreme Court of Ohio's
18 ruling. In cases like Ward v. Illinois and Michigan v. New
19 York and some other cases, this Court has said, you are
20 bound by decisions of the state court unless, clearly, you're
21 erroneous or violative of some other provision of the Consti-
22 tution. I think that what this Court should, could zero in
23 on is whether or not the Supreme Court of Ohio announced a
24 proper rule of law, because that is a general pronouncement
25 in Ohio. But whether or not the Supreme Court of Ohio

1 correctly reviewed the facts, they really didn't, but they
2 affirmed the Court of Appeals who reviewed the facts, and
3 in Ohio the Court of Appeals is the last court which can
4 review the facts and the evidence. Thank you very much.
5 I now yield to the Solicitor General.

6 MR. CHIEF JUSTICE BURGER: Mr. Levander.

7 ORAL ARGUMENT OF ANDREW J. LEVANDER, ESQ.,
8 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

9 MR. LEVANDER: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 I would like primarily to address the merits of
12 petitioners' selective prosecution claim. But, as we pointed
13 out in our amicus curiae brief, we believe that the Court
14 lacks jurisdiction under Section 1257 to hear this case.

15 This case is different than Cox Broadcasting and
16 some other cases. This case falls into this morning's deci-
17 sion in San Diego Electric and the long run of cases including
18 Alvez, Republic Gas Company, Radio Station WOW, Cox Broad-
19 casting dictum, which say that where there are other federal
20 issues pending to be determined on the remand, then it would
21 be highly inappropriate for this Court to take jurisdiction
22 of the case which could come back again after all the federal
23 issues had been decided, as has been pointed out in Mr. Justice
24 Rehnquist's comments, the decision below, the trial, will
25 produce other federal questions if petitioners are convicted.

1 Of course, if they are acquitted, this Court will never have
2 to reach the selective prosecution claim, and for those rea-
3 sons we believe that the decision is not final within the
4 meaning of 1257.

5 Now, I would like to make one other point, or two
6 other points. First, some of the decisions like Cox Broad-
7 casting and Miami Herald which have stretched the concept
8 of finality to some extent, have done so on the basis,
9 I think, that there was a pressing First Amendment issue
10 which affected the lot of the press as a whole, of the
11 public as a whole, and there really are no other federal
12 issues to be decided, and therefore it was imperative that
13 the decision be made at that time.

14 A selective prosecution claim, and petitioners'
15 selective prosecution claim, is by definition very different.
16 It only affects historical fact and these petitioners, by
17 definition it is not affecting the other members of the press
18 because under their claim the State of Ohio has failed to
19 prosecute other members of the press. Therefore, it seems,
20 you know, clearly inappropriate for the Court to try to
21 stretch the jurisdictional provisions, and I think that the
22 Court should dismiss the writ.

23 My brother did point out one other matter of great
24 concern on the jurisdictional issue to us, and that is that
25 the 9th Circuit's recent decision in Wilson. That decision

1 held that a district court's denial of a selective prosecu-
2 tion claim prior to trial was immediately appealable by the
3 defendant. Now, that is going to cause havoc with the crimi-
4 nal justice system because any defendant can come in and make
5 a selective prosecution claim, and if he's denied a hearing
6 or he's denied on the merits, then he can simply take an
7 appeal. It's much different than Abney double jeopardy
8 claims. Also, the Equal Protection Clause does not have the
9 history --

10 QUESTION: Is the Government going to try to bring
11 Wilson here?

12 MR. LEVANDER: It really can't, Your Honor, because
13 we prevailed on the merits in the case, after they had
14 reached the -- but in deciding this jurisdictional issue,
15 I urge the Court to be very aware of this problem and if
16 the Court would like we'd be willing to submit a post-argument
17 brief in short order on this point, if it would be of any
18 use to the Court.

19 Turning to the merits, the trial court held as a
20 matter of law that where there's a test case, where there is
21 one defendant among similarly situated other defendants, and
22 a prosecution is brought only against the one, that that is
23 legally insufficient. There were no factual findings,
24 as the Ohio Supreme Court noted in a footnote at the end of
25 its opinion, that there were no factual findings by the

1 trial court about bad faith, bad motives, cartoons, anything.
2 It simply stated that it was legally insufficient to have
3 a test case.

4 Now, my brother, Mr. Fahringer, has sort of waffled
5 on this point this morning but in his reply brief at page 5
6 he concedes now, begrudgingly, that a test case is an appropriate prosecutorial stratagem. That concession is well
7 warranted by this Court's decisions in Mackay Telegraph,
8 Moog Industries, and Universal-Rundle Corp., which are all
9 cited in the briefs, as well as many other cases.

11 Where there are numerous defendants similarly
12 situated and a prosecutor lacks resources to prosecute all
13 or where the law is of some question, whether the law is to
14 be applied to a particular kind of situation or a particular
15 kind of defendant --

16 QUESTION: In that situation, could he select his
17 defendant because of the cartoon he published? What is your
18 view on that?

19 MR. LEVANDER: No. I think he could select him
20 randomly, and the courts have so held.

21 QUESTION: All right, but could he do it because
22 of the cartoon?

23 MR. LEVANDER: He could not select --

24 QUESTION: You agree he could not do that?

25 MR. LEVANDER: If the cartoon is constitutionally

1 protected and he was doing it because he was punishing him
2 for an exercise of constitutional right, we would agree, that
3 would be inappropriate.

4 QUESTION: Well, that's not the question.

5 MR. LEVANDER: That's not the question here because
6 here, it seems to me, the evidence is unequivocal as to what
7 happened. There were complaints made about the July Hustler
8 issue. Some of those complaints focused on the cartoon,
9 some of them focused on the magazine as a whole. But even
10 assuming that every complaint focused on the cartoon, and
11 that spurred an investigation, it is simply irrelevant in an
12 equal protection case to apply the --

13 QUESTION: Let me ask you one other question. Let's
14 assume that it was not the sole reason but that's the only
15 distinguishing factor from all other magazines and it was one
16 of the reasons. Would that be permissible?

17 MR. LEVANDER: I believe it would be if --

18 QUESTION: It would be if it was one reason, but
19 as long as you have some other reason, why then it's a test
20 case?

21 MR. LEVANDER: That's exactly right. In the
22 Court's equal protection cases, Mt. Healthy v. Doyle, Justice
23 Powell's opinion for the Court in Bakke, in Arlington Heights
24 footnote 21, the Court has repeatedly stated that where in an
25 equal protection case the moving party, here petitioners,

1 have established that invidious or intentionally discrimina-
2 tory reason is the motivating cause for a particular kind of
3 state action -- and we don't have that here; we have not
4 established that -- then the burden shifts to the state to
5 show that the invidious factor is not the but-for clause,
6 so that is the test. Here I don't believe that we get to
7 the but-for problem. If we do I think that the prose-
8 cutor's testimony at the hearing overwhelmingly shows that
9 the decision to prosecute was made on various rational
10 factors, including his view that Hustler was more obscene,
11 the fact that it was a more notorious violator of the law,
12 the fact that it was in-state, and even if you could get extra-
13 dition over these other out-of-state publishers, there was
14 no need for Cleveland to expend that additional amount of
15 money in bringing a test case to pick the most difficult to
16 prosecute. As the Chief Justice has said, earlier today, he
17 can pick the strongest case and he can pick the easiest case
18 for himself. That's entirely appropriate.

19 QUESTION: He can also, can't he, can't he pick one
20 he just doesn't like?

21 MR. LEVANDER: Well, then the question goes to --

22 QUESTION: Say there's ten. And he's going to pick
23 one. He says, well, they're all absolutely equal, they'd
24 all be valid prosecutions. I'm going to pick the one I like
25 the least.

1 QUESTION: Or, in this case, the one that offends
2 the prosecutor the most?

3 MR. LEVANDER: Well, certainly where --

4 QUESTION: Or where -- going to pick the one that
5 he's had the most protests about?

6 MR. LEVANDER: That is entirely appropriate, because
7 it is an aim of criminal law not only to punish but to deter.
8 And insofar as the particular defendant has the most notoriety
9 and therefore the effect of a conviction will be most telling
10 on a future compliance, certainly picking out the most
11 notorious offender is perfectly appropriate. And in certain
12 cases like tax cases, for example, where there's a protester
13 who has willfully violated the laws, his public statements
14 will facilitate the prosecution.

15 QUESTION: Well, if he says, in my next campaign
16 I'll get farther if I go after this magazine rather than
17 another?

18 MR. LEVANDER: Well, one would hope that the prose-
19 cutorial decisionmaking was not made on --

20 QUESTION: That isn't what I asked you, what about that?

21 QUESTION: Would you apply the same standard in
22 tax cases and regulatory cases that you would in cases in-
23 volving publications, magazines and newspapers?

24 MR. LEVANDER: Yes, I --

25 QUESTION: Is there the same breadth of discretion

1 in the prosecutor to prosecute newspapers if he doesn't like
2 their editorial point of view, for example?

3 MR. LEVANDER: Well, that's -- there's an obvious
4 First Amendment defense there..

5 QUESTION: Under your answers, as I understand it,
6 that's perfectly permissible. If you don't like the kind of
7 editorials that he's been writing, then we'll prosecute.

8 QUESTION: What's he prosecuting him for?

9 MR. LEVANDER: That's right, that's the question.
10 Here he's prosecuting him for obscene --

11 QUESTION: Prosecuting him for a crime that all
12 the other newspapers are committing the same way.

13 QUESTION: He can't prosecute him for printing the
14 editorial.

15 MR. LEVANDER: No, he is not.

16 QUESTION: You just pick him out for that reason
17 is all. You don't prosecute anybody who doesn't write such
18 an editorial.

19 QUESTION: He'd probably prosecute the newspaper
20 for tax evasion or for something else.

21 MR. LEVANDER: And the sole reason that he would
22 not have prosecuted but for a particular editorial? That, it
23 seems to me, might be inappropriate. But if he would have
24 prosecuted --

25 QUESTION: Not under your answers to Justice White.

1 You said he doesn't like him; that's all that counts. And he
2 may not like him because of the editorials.

3 MR. LEVANDER: Well, if his intent is to silence a
4 constitutional right, or if it is an invidious race-based
5 or religious-based or other arbitrary kind of base, the basis
6 for the prosecution is the product of that kind of invidious
7 kind of or arbitrary or irrational discrimination, then you
8 have a problem. That was not even -- the conclusory allega-
9 tions in this case did not even warrant a hearing. He ad-
10 mitted that he had no idea what the proof was going to show
11 when the prosecutor took the stand. In our view, under
12 federal law, a hearing was not even necessary in this case.
13 The hearing did show, however, quite conclusively, that this
14 prosecution was perfectly permissible and rationally chosen.
15 And we think that more difficult cases might arise. This is
16 certainly not one of those cases.

17 The other point that I would like to make about the
18 cartoon. If, Justice Stevens, you were right that insofar
19 as the prosecution was based at all on the cartoon, that it
20 would be an impermissible prosecution. Then anytime you had
21 a complaining witness who brought -- I see my time --

22 MR. CHIEF JUSTICE BURGER: Finish your sentence.

23 MR. LEVANDER: Thank you. Anytime you had a com-
24 plaining witness who believed or brought the crime to the
25 notice of the police because they didn't like the defendant --

1 let's assume it's a drug pusher or a bank robber or whatever --

2 QUESTION: This case involves a publication. Let's
3 have examples that involve either newspapers or magazines.
4 There's sure a difference in armed robberies or burglaries.
5 They're entirely different.

6 MR. LEVANDER: Well, for example, suppose an em-
7 ployee at a newspaper or not even an employee, a person knows --

8 QUESTION: Let's say an editorial writer. Give us
9 a case involving an editorial writer.

10 MR. LEVANSER: Fine. The person who reports the
11 violations of the Labor Standard Act or tax evasion does so,
12 a private person, because he has a dislike of the editorial
13 policy of a particular paper. It is invidious state action
14 which violates the Equal Protection Clause. The private
15 motivation of the reporting party which leads to the investi-
16 gation is simply irrelevant and therefore --

17 QUESTION: Would it be irrelevant if the record
18 were clear that there were about 200 other people just like
19 this one that they had never prosecuted before?

20 MR. LEVANDER: Yes. Completely irrelevant. Thank
21 you very much.

22 MR. CHIEF JUSTICE BURGER: Thank you. Do you have
23 anything further, Mr. Fahringer? You have two minutes.

24 MR. FAHRINGER: Please, Your Honor. Thank you.

25 ORAL ARGUMENT OF HERALD PRICE FAHRINGER, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

1 MR. FAHRINGER: I wanted to bring to the Court's
2 attention what the trial judge said at the very end of the
3 case. "For purpose of this motion the court is limited by
4 the testimony and must search that testimony objectively in
5 relationship to the constitutional guidelines established
6 by a series of previous judicial decisions on the discrimina-
7 tory prosecution question in this court's decision that the
8 testimony supports the allegation of the defendant."

9 So I believe, Your Honors, that language can be
10 interpreted, albeit a very short decision, that the judge
11 did make a finding, a fact finding decision that the testi-
12 mony in general supported our claim.

13 QUESTION: The Supreme Court of Ohio didn't agree
14 with him.

15 MR. FAHRINGER: That's true, Your Honor.

16 QUESTION: That's the decision that's binding on
17 us, isn't it?

18 MR. FAHRINGER: Well, Your Honor, I would like to
19 repeat it again, and I apologize for disagreeing with you,
20 that I think in the dissent when they say, we have always
21 given great weight to the trier of the fact, and this Court
22 too has given great weight to the trier of the fact in the
23 past, I think that should be done here.

24 Last, let me just say this. If it is part of the
25 reason, if the First Amendment implications are part of the

1 reasons for prosecuting the magazine, then it seems to me
2 there has to be a much more in-depth inquiry than we had here
3 as to whether or not this is a test case or not. Once the
4 concession is made that it is part of the reason why we
5 went after this magazine, then I don't think it's sufficient
6 simply to label it a test case but that there should be some
7 corroboration of its being a test case. Thank you.

8 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
9 The case is submitted.

10 (Whereupon, at 11:13 o'clock a.m., the case in the
11 above-entitled matter was submitted.)
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 80-420

LARRY C. FLYNT, JIMMY R. FLYNT
AND ALTHEA LEASURE FLYNT,

V.

OHIO

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY:

Edl J. Wilson

1981 APR 1 PM 1 55

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE