IN THE

Supreme Court of the United States

October Term, 1957

No. 91

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a Corporation,
Petitioner,

v.

STATE OF ALABAMA, *ex rel.* JOHN PATTERSON, Attorney General,
Respondent.

BRIEF FOR PETITIONER

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Opinion Below

The opinion of the Supreme Court of Alabama (R. 23) is reported at 91 So. 2d 214.

Jurisdiction

The judgment of the court below was entered on December 6, 1956 (R. 31). On March 4, 1957, by order of Mr. Justice Black, the time within which to file the petition for writ of certiorari was extended to March 20, 1957. The petition was filed on March 20, 1957, and was granted on May 27, 1957. This Court has jurisdiction of this cause under Title 28, United States Code, Section 1257(3) despite the effort of the Supreme Court of Alabama to interpose the state's procedure to prevent review by this Court. See *Davis* v. *Wechsler,* 263 U. S. 22; *Rogers* v. *Alabama,* 192 U. S. 226; *Dorchy* v. *Kansas,* 272 U. S. 306. Part of

the petition for writ of certiorari was devoted to demonstrating that this case came within the rationale of those cases. As petitioner reads the Brief in Opposition (page 9), respondent concedes the basic validity of this thesis, and *Konigsberg* v. *State Bar of California*, 353 U. S. 252, underscores the fact that the Court has not departed from the principles enunciated in *Davis* v. *Wechsler*, *supra*; *Rogers* v. *Alabama*, *supra*, and cognate cases in its approach to jurisdiction. Petitioner submits, therefore, that jurisdiction to review this cause is unquestionably vested in this Court and rests upon the argument in the petition for writ of certiorari to support this position.

Question Presented

Did the State of Alabama interfere with the freedom of speech and freedom of association and deny due process of law to petitioner, the NAACP, and its members in violation of the Fourteenth Amendment in interfering with and prohibiting the continuation of the efforts of petitioner to secure and enforce rights of Negro citizens guaranteed by the Constitution and laws of the United States?

Statement

Petitioner's Background and General Organizational Activities

Petitioner is a non-profit membership organization, founded in 1909 and incorporated in 1911 under the laws of the State of New York. The driving force which led to its birth was the conviction that if the American public became aware of the injustices which Negroes suffered and the circumscribed lives which they were forced to lead solely because of color discrimination, an aroused public opinion would demand that necessary social, economic and political reforms be effected to remove racial discrimination and prejudice from American life. See Ovington, "How the NAACP Began" 8 *Crisis* 184 (1914); Kytle,

"The Story of the NAACP," *Coronet* 140 (August 1956); "What Is the NAACP," 36 *Information Service* #8, Bureau of Research and Survey, National Council of Churches of Christ in the USA (Feb. 23, 1957). Since its inception, the efforts of the organization and its members have been directed exclusively towards finding adequate ways and means of eradicating color and caste discrimination from all facets of American life. See Wollman, "What's Behind the NAACP," *N. Y. World Telegram & Sun*, May 12, 19, (1956); Davis, "The NAACP: A Look At the Record and Plans of One of the Nation's Most Controversial Organizations," *Winston-Salem Sunday Journal-Sentinel*, Feb. 26, 1956; "Segregation Conflict: Role of the NAACP," *N. Y. Times*, Feb. 26, 1956 E 9; "Voice of the Negro in America," *Milwaukee Journal*, March 11, 1956; "NAACP, Negro Champion, Sets '63 Integration Target," *Chicago Daily News*, March 11, 1956; "An Interview With NAACP Brass," *Montgomery Advertiser*, June 26, 27, 1956.

Its Articles of Incorporation describe its aims and purposes as:

> . . . voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens; to advance the interests of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability and complete equality before the law.
>
> To ascertain and publish all facts bearing upon these subjects and to take lawful action thereon; together with any and all things which may lawfully be done by a membership corporation organized under the laws of the State of New York for the further advancement of these objects.[1]

[1] A copy of these Articles was filed with petitioner's answer. These and other allegations in the answer were summarized in the petition for certiorari in the Supreme Court of Alabama, which constitutes the record here.

Petitioner is committed to the achievement of desired social, economic and political reforms within the framework of our democratic society. It seeks to create a climate of opinion in which interracial understanding can take place and basic rights and privileges will be accorded to all persons without regard to race. From time to time it attempts to persuade the legislature to adopt and the executive to enforce remedial laws to provide protection against racial discrimination, and to aid individuals to vindicate their constitutional rights to freedom from discrimination in the courts wherever necessary.[2]

From the outset the organization has condemned racial intolerance and disenfranchisement. It has sought to secure public and legislative support for anti-discrimination laws, *e.g.*, F. E. P. C. laws, anti-lynching laws, federal and state civil rights laws. Its officials have testified on the need for federal legislation of this kind before the Congress and at various local legislative hearings.[3] In

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[2] See, Note, Private Attorneys-General, 58 *Yale L. J.* 574 (1949).

[3] For examples of this phase of petitioner's activities see:

Segregation Hearings, H. J. Res. 75, House Judiciary Comm. (66th Cong. 2d Sess. 1920) pp. 8-10 (Neval H. Thomas).

Anti-Lynching Hearings, S. 121, Subcommittee of Senate Judiciary Comm. (69th Cong. 1st Sess. 1926) pp. 6-37 (James Weldon Johnson); H. R. 259, House Judiciary Comm. (66th Cong. 2d Sess. 1920) pp. 22-27 (Arthur B. Spingarn); S. 1978, Subcommittee of Senate Judiciary Comm. (73rd Cong. 2d Sess. 1934) pp. 62-67 (Arthur B. Spingarn).

Poll Tax Hearings, S. 1280, Subcommittee of the Senate Judiciary Comm. (77th Cong., 2d Sess. 1942) pp. 335-338 (Walter White); H. R. 7, Senate Judiciary Comm. (78th Cong. 1st Sess. 1943) pp. 60-69 (Statements of William H. Hastie and Leon A. Ransom).

FEPC Hearings, S. 2048, Subcommittee of Senate Com. on Education and Labor (78th Cong. 2d Sess. 1944) pp. 196-202 (Walter White); S. 101, Subcommittee of Senate Comm. on Education and Labor (79th Cong. 1st Sess. 1945) pp. 170-174 (William H. Hastie); S. 984, Subcommittee of Senate Committee on Labor and Public Welfare, (80th Cong. 1st Sess. 1947) pp. 182-190 (Roy Wilkins);

1933 it established a full-time legal department whose function was to formulate legal theories which could be utilized

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H. R. 4453, Special Subcommittee of House Committee on Education and Labor (81st Cong. 1st Sess. 1949) pp. 293-300 (Clarence Mitchell).

Civil Rights Bill Hearings, S. 83, Subcommittee on Constitutional Rights, Senate Judiciary Com. (85th Cong. 1st Sess. 1957) pp. 291-326 (Roy Wilkins).

Grants to States for the Improvement of Public Elementary and Secondary Schools Hearings, S. 1305, Subcomm. of Senate Comm. on Education and Labor, (76th Cong. 1st Sess. 1939) pp. 178-184 (Charles H. Houston).

Federal Assistance for School Construction Hearings, H. Res. 73 (82nd Cong. 2d Sess. 1952) p. 352 (Letter of Clarence Mitchell).

Universal Military Training Hearings, H. R. 515, House Com. on Military Affairs, (79th Cong. 2d Sess. 1946) pp. 940-948 (Leslie S. Perry).

Universal Military Training Hearings, Senate Committee on Armed Services, (80th Cong. 2d Sess. 1948) pp. 662-668 (Jesse O. Dedmond, Jr.).

Military Reserve Training Hearings, H. R. 6900, (84th Cong. 1st Sess. 1955) pp. 4260-4272 (Clarence Mitchell).

Amendments to Railway Labor Act Hearings, S. 3295, Subcommittee of Committee on Labor and Public Welfare (1950) pp. 242-248 (Clarence Mitchell).

Amending the Interstate Commerce Act—Segregation of Passengers Hearings, H. R. 563 (83rd Cong. 2d Sess. 1954) pp. 96-118 (Robert Carter and Clarence Mitchell).

Economic Security Act Hearings, S. 1130, Senate Committee on Finance (74th Cong. 1st Sess. 1935) pp. 640-647 (Charles H. Houston).

Amendments to Fair Labor Standards Act Hearings, H. R. 3914, House Committee on Labor (79th Cong. 1st Sess. 1945) pp. 441-448 (Leslie S. Perry).

Defense Housing Act Hearings, S. 349, Senate Committee on Banking and Currency (82nd Cong. 1st Sess. 1951) pp. 477-481 (Clarence Mitchell).

Limitation on Debate in the Senate Hearings, S. Res. 41 (82nd Cong. 1st Sess. 1951) pp. 34-64 (Walter White).

Habeas Corpus Hearings, H. R. 5649 (84th Cong. 1st Sess. 1955) pp. 78-88 (Thurgood Marshall).

in the courts to secure relief against discriminatory governmental action and authorized the attorneys in the department to participate directly as counsel in litigation involving or raising questions of racial discrimination where such requests were made by the litigant or his attorney, and where determination of the issues raised was likely to affect the status of Negro Americans in general. Some of the litigation in this Court for which petitioner is in part responsible includes *Missouri ex rel Gaines* v. *Canada*, 305 U. S. 337; *Smith* v. *Allwright*, 321 U. S. 649; *Sipuel* v. *Board of Regents*, 332 U. S. 631; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; *Sweatt* v. *Painter*, 339 U. S. 629; *Brown* v. *Board of Education*, 347 U. S. 483; *Mayor* v. *Dawson*, 350 U. S. 877; *Gayle* v. *Browder*, 142 F. Supp. 707 (M. D. Ala. 1956), aff'd, 352 U. S. 903.

Petitioner has chartered affiliates—designated as college chapters, youth chapters, Branches and State Conferences of Branches—throughout the United States. These affiliates are unincorporated associations and membership therein, upon acceptance at petitioner's principal office in New York, constitutes membership in the corporation. Each affiliate is semi-autonomous, with its own officials and governing body, and within the limits of the general directive "to promote the economic, political, civic and social betterment of colored people, and their harmonious cooperation with other peoples, in conformity with the articles of the Association, its Constitution and by-laws, and as directed by the Board of Directors of the Association," each determines for itself the program it will follow at the local level (R. 7-8).[4]

Petitioner's Board of Directors from time to time announces general policy. Such a general policy was that

[4] Constitution and bylaws of Branches of the N. A. A. C. P., Article I, Section 2, March 1956.

adopted by the Board on October 9, 1950, and by Convention June 1951, forbidding all N. A. A. C. P. affiliates, officers and members to participate in any effort to obtain "separate but equal" facilities.

Petitioner's Background and Organizational Activities In Alabama

The first affiliates of petitioner in Alabama were chartered in 1918. These were the Montgomery and Selma Branches. Since that time petitioner has chartered various other affiliates in Alabama and in April, 1951 established a regional office in Birmingham, designated as its Southeast Regional Office.

A Southeast Regional Secretary, whose chief duties are to supervise and coordinate the programs of petitioner's various affiliates in Alabama, Georgia, Florida, Mississippi, North Carolina, South Carolina and Tennessee, was placed in charge of this office. She disseminates information to members and to the general public concerning civil rights and racial discrimination to seek to guide and assist petitioner's various affiliates in the region in devising and executing a program designed to eliminate racial discrimination in their respective communities. Petitioner employed a field secretary, and his duties were to interest persons in Alabama in the aims, purposes and program of the organization and to convince as many persons as possible to take an active part in the effort to secure equal rights for Negroes. Except for these two persons and a clerical worker in the Birmingham office, all other persons connected with the organization in Alabama, whether officers or members, were unpaid volunteers (R. 7).

Petitioner rented office space in Birmingham for its Southeast office and secured furniture and other office equipment, but otherwise owns no property, real or personal, in Alabama. The injunction here issued necessitated

the closing of this office, the dropping of the field secretary and clerical worker from petitioner's payroll and the transfer of the Regional Secretary and petitioner's Southeast Regional Office to another state.

Through its national office, its affiliates, and more recently its Southeast Regional Office, petitioner aided Alabama Negroes in seeking vindication of their constitutional rights in the federal courts by helping to defray the expenses of suits involving the right of Negroes to vote, to equal access to nonsegregated facilities in public schools, to non-discriminatory treatment in public transportation facilities and to due process in criminal proceedings. Among law suits in this category were *Mitchell* v. *Wright*, 154 F. 2d 580 (5th Cir. 1946); *Gayle* v. *Browder, supra; Fikes v. Alabama*, 352 U. S. 191; *Reeves* v. *Alabama*, 348 U. S. 891.

Petitioner engaged in these activities without complying with Sections 192, 193, 194, Title 10, Alabama Code of 1940 and Article 12, Section 232, Constitution of Alabama, 1901, which require foreign corporations to register with the Secretary of State, because petitioner in good faith believed that these provisions did not apply to it (R. 8). The first notice petitioner had that the state deemed it subject to these statutes was the service of the temporary restraining order and the complaint herein (R. 7), whereupon petitioner offered to register (R. 7).

The Instant Proceedings

Upon a bill of complaint filed by the Attorney General of Alabama, which alleged in essence that petitioner was giving aid and assistance to Alabama citizens in their efforts to secure relief from racial discrimination and doing and "continuing to do business" within the state without first having complied with Article 12, Section 232, Consti-

tution of Alabama, 1901; Title 10, Sections 192, 193, 194, Code of Alabama, 1940 and was "thereby causing irreparable injury to the property and civil rights of the residents and the citizens of Alabama for which criminal prosecution and civil action at law afford no adequate relief," the trial court issued the requested restraining order *ex parte*, barring petitioner from:

> Soliciting membership in respondent corporation or any local chapters or subdivisions or wholly controlled subsidiaries thereof within the State of Alabama.
>
> Soliciting contributions for respondent or local chapters or subdivisions or wholly controlled subsidiaries thereof within the State of Alabama.
>
> Collecting membership dues or contributions for respondent or local chapters or subdivisions or wholly controlled subsidiaries thereof within the State of Alabama.

And, although the state did not request it, from:

> Filing with the Department of Revenue and the Secretary of State of the State of Alabama any application, paper or document for the purpose of qualifying to do business within the State of Alabama (R. 19).

On July 2, 1956, petitioner filed a motion to dissolve the injunction and demurrers to the bill (R. 3). Hearing on the motion to dissolve and the demurrers was set down for July 17 (R. 3). On July 5, the state filed a motion for a pretrial discovery order to require petitioner to disclose to the state the names and addresses of all of its members and of all persons authorized to solicit memberships; all correspondence pertaining to or between petitioner and any person, corporation, etc., in Alabama; all evidence of ownership of real and personal property held by petitioner in the state; cancelled checks, bank statements, etc., showing any financial transaction between peti-

tioner and persons, chapters, etc., in the state; all letters, papers, correspondence, agreements between or pertaining to petitioner and Autherine Lucy and Polly Ann Myers; the names and addresses of all of its officers and employees in the state; and all papers relating to or between Aurelia S. Browder and the other plaintiffs in *Gayle* v. *Browder*, their Alabama counsel and petitioner (R. 5-6). The state alleged in its motion that examination of the requested documents was essential to its preparation for trial (R. 3).

The state motion, given precedence over petitioner's pleadings, was heard on July 9 and granted on July 11 (R. 6), with petitioner being ordered to produce the documents on July 16, 1957 (R. 6). (The order is set out at R. 20.) The court extended the time to produce the documents requested to July 24, 1956, and simultaneously continued the hearings on the demurrers and motion to dissolve from July 17 to July 25 (R. 6). On July 23 petitioner filed its answer, to which it attached executed foreign corporation registration forms ready for filing with the Secretary of State and asked the court's permission to file same, which permission was refused (R. 7). On the same date petitioner filed a motion to set aside the order to produce, which was set down for hearing on July 25. After such hearing, on July 25th, the court denied petitioner's motion to vacate the order for pretrial discovery and, upon petitioner's continued refusal to comply therewith, adjudged it in contempt and fined it $10,000, with a proviso that if the order was not obeyed within 5 days the fine was to be $100,000 (R. 8-11).

On July 30, petitioner filed a motion to set aside and stay execution of the contempt order pending its review by the Supreme Court of Alabama (R. 11). With this motion petitioner tendered all documents requested except the names and addresses of its members and its correspondence files. The latter request could not be complied with because it was unduly burdensome for petitioner to

go through all its files and furnish correspondence requested and interfered with the normal operation of its offices (R. 12). The former request was refused because of petitioner's belief that the order *per se* constituted an abridgement of its rights and those of its members to freedom of association and free speech, and because of its belief that to comply with the order would subject petitioner organization to destruction and its members to reprisals and harassment, thereby effectively depriving petitioner and its members of the right to the exercise of freedom of association and free speech—all in violation of their constitutional rights (R. 13). Accompanying this motion, and tendered, were affidavits showing that members of the N. A. A. C. P. in nearby counties had been subjected to reprisals when identified as signers of a school desegregation petition, and a showing of evidence of hostility to the purposes and aims of the organization in Alabama, and evidence that groups in the state were organized for the express purpose of ruthlessly suppressing petitioner's program and policy (R. 13).

This motion was heard, tender of documents refused and the motion denied on July 30 (R. 14), and on the same day a motion to stay was filed in the Supreme Court of the state (R. 14). This motion was heard on July 31 and was denied the same day (R. 14). Without waiting for the Supreme Court to announce its decision, the trial court on July 31 adjudged petitioner in further contempt and assessed a fine of $100,000 against it (R. 14-15). Petitioner filed a petition for writ of certiorari and brief in support thereof in the Supreme Court of Alabama on August 8, which petition was denied that same day as insufficient (91 So. 2d 221). On August 20, 1956, petitioner filed a second petition for writ of certiorari, which was denied December 6, 1956 (R. 23). From this decision petitioner brings the cause here.

The Climate in Alabama

This case cannot be properly considered without being viewed against the background and setting in which it arose. Alabama officials in responsible positions have set the tone and pattern for local governmental officials, civic leaders, educators, parents, and citizens in voicing bitter opposition to any change in the state policy and pattern of racial segregation, regardless of any requirement of the United States Constitution. The Governor,[5] Lt. Governor,[6]

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[5] *Southern School News,* March, 1956, Vol. II, No. 9, Gov. James E. Folsom: "Anybody with any sense knows that Negro children and white children are not going to school together in Alabama any time in the near future . . . in fact, not for a long time." p. 6, col. 1.

Southern School News, April, 1956, Vol. II, No. 10, Gov. James E. Folsom campaigning for election as national Democratic committeeman: "My views are well known on the subject. I was and am for segregation. That's all I have to say on the subject." p. 5, col. 1.

Southern School News, June, 1956, Vol. II, No. 12, Gov. James E. Folsom: Folsom announced that white and Negro students would not attend the same grade schools and high schools in Alabama "as long as I am Governor." p. 10, col. 3.

Southern School News, July, 1956, Vol. III, No. 1, Gov. James E. Folsom commenting on Lucy affair: "There is not going to be any race-mixing in our public schools as long as I am governor." p. 10, col. 5.

[6] *Southern School News,* December, 1955, Vol. II, No. 6, Lt. Gov. Guy Hardwick addressing the Alabama Chamber of Commerce stated that there can be no enforcement of the Supreme Court decision in Alabama because the public is "bitterly opposed" to such a change. He stated that the state legislature had passed a school placement law and "it appears they will pass others and additional laws in order to insure that segregation will remain in our schools." p. 4, col. 4.

Southern School News, August, 1957, Vol. IV, No. 2, Lt. Gov. Guy Hardwick: "[If the civil rights bill passes] all white men will, of necessity, be drawn together by common bonds of resistance, and I predict they will refuse to employ, feed, clothe or otherwise aid or assist Negroes if the latter insist on disrupting and upsetting our way of life in Alabama . . . We will resort to the greatest and most effective boycott ever seen in Alabama or any other state . . . No man will be elected governor of Alabama unless he enters into a solemn pact with the voters . . . to maintain segregation, and further pledges he will not use the National Guard . . . manning tanks, to escort Negro children into white schools as was done in Tennessee and Kentucky." p. 4, col. 5.

state legislators,[7] the Alabama State Superintendent of

[7] *Southern School News*, June, 1955, Vol. I, No. 10, Sen. Sam Engelhardt (Macon County): As far as I am concerned, abolition of segregation will never be feasible in Alabama and the South. No brick will ever be removed from our segregation walls." p. 2, col. 2. Sen. Walter Givhan (Dallas County): "I think we have won a decided victory for the South. It was brought about by the constant fight the southern people have put up, bringing to the attention of the American public that integration wasn't feasible and never would have worked, and that the southern people under no condition would have stood for it." p. 2, col. 2. Sen. Roland Cooper (Wilcox): "I cannot forsee where desegregation would be feasible or local conditions would warrant it within 100 years in Wilcox County." p. 2, col. 2. Sen. E. O. Eddins (Marengo County) advocated prompt action "to pass every law that would be a safeguard so far as segregation is concerned." p. 2, col. 2.

Southern School News, August, 1955, Vol. II, No. 2, Sen. Sam Engelhardt (Macon County) stated to the Alabama Senate Education Committee "We've got 190 colored teachers in Macon County and the board [Macon's Board of Education] tells me they'll fire every one of them that takes part in this agitation." p. 13, col. 3. * * * "The National Association for the Agitation of Colored People forgets there are more ways than one to kill a snake . . . we will have segregation in the public schools of Macon County or there will be no public schools." p. 13, col. 5.

Southern School News, January, 1957, Vol. III, No. 7, Sen. Sam Engelhardt (Macon County) commenting on The Institute on Non-Violence in Montgomery, Dec. 3-9, 1956: "Montgomery is sitting on a potential keg of dynamite. If there is violence, and pray that there won't be, each of us should buy a towel and send it to the Supreme Court for them to wipe the blood off their hands . . . Think white, talk white, buy and hire white." p. 15, col. 1.

Southern School News, April, 1957, Vol. III, No. 10, Rep. W. L. Martin (Greene County): The state appropriation to Tuskegee was originally made "to prevent the necessity of Negroes attending white colleges." Should members of their race insist on enrolling at white colleges, "they have no more need for state money." p. 13, col. 2-3.

Southern School News, June, 1957, Vol. III, No. 12, Senator Albert Boutwell (Birmingham): "I think we will adopt only measures to keep segregation in a legal manner, and that we are going to do it with a great deal of deliberation. We don't want to abolish schools except as a last resort. But we must be ready to do it if necessary." p. 12, col. 1-2. Senator Broughton Lamberth (Tallapoosa County): "We'll do everything possible to keep segregation in the schools." p. 13, col. 4.

Schools,[8] local officials[9] and even judges,[10] have consistently issued public declarations that the constitutional mandate prohibiting racial discrimination in public education should be resisted, and segregation strengthened. Following the May 17, 1954 decision, the state assembly adopted scores of resolutions and pieces of legislation,

[8] *Southern School News,* June, 1955, Vol. I, No. 10, State Superintendent of Education, Austin R. Meadows commenting on the May 31, 1955 U. S. Supreme Court decision: "I believe that the overwhelming majority of Negroes realize that segregation is what the people in Alabama want, and I believe they are friendly enough to cooperate with the majority who want segregation." p. 2, col. 2.

Southern School News, May, 1957, Vol. III, No. 11, State Superintendent of Education, Dr. Austin R. Meadows, suggested that segregation might be maintained by "our white people influencing the Negroes to go to their own schools." p. 5, col. 2.

[9] *Southern School News,* Sept., 1955, Vol. II, No. 3, Board of Education of Mobile in a formal statement of policy refusing to end segregation: ". . . the tradition of two centuries can be altered by degrees only." p. 3, col. 4.

Southern School News, February, 1956, Vol. II, No. 8, L. R. Grimes, Chairman of the Montgomery County Board of Revenue announcing his membership in the White Citizens Council: "I think every right-thinking white person in Montgomery and the South should do the same. We must make certain that Negroes are not allowed to force their demands on us . . ." p. 6, col. 5.

Southern School News, December, 1956, Vol. III, No. 6, Mayor W. A. Gayle of Montgomery commenting on the bus decision: "Like thousands of our Montgomery citizens, the city commission . . . deplores the . . . decision . . . at the same time we ask our fellow citizens to remain calm and coolheaded, while your commissioners work diligently and earnestly to do all legal things necessary to continue enforcement of our segregation laws and ordinances of all kinds . . . enacted in recognition of long-established customs, morals and habits of our people . . . We shall continue to enforce segregation." p. 13, col. 3.

Southern School News, January, 1957, Vol. III, No. 7, the Montgomery City Commission commenting on the Supreme Court decision ending segregation on Montgomery buses: "Although we consider the Supreme Court's decision to be the usurpation of the power to

[10] Text of this footnote appears on page 15.

ranging from a "nullification" resolution to pupil placement laws, intended to maintain racial segregation and defy federal authority.[11] Threatened and actual loss of

amend the Constitution . . . we have no alternative but to recognize it. That is not to say, however, that we will not continue, through every legal means at our disposal, to see that the separation of races is continued on the public transportation system here in Montgomery . . . The City Commission . . . will not yield one inch, but will do all in its power to oppose the integration of the Negro race with the white race in Montgomery and will forever stand like a rock against social equality, intermarriage, and mixing of the schools . . . There must continue the separation of the races under God's creation and plan." p. 15, col. 1-2.

Southern School News, March, 1957, Vol. III, No. 9, a Montgomery grand jury returning indictments against four white men on dynamiting charges: The return of the indictments "should not be construed as any weakening of the determination of the people of Montgomery to preserve our segregated institutions. We reaffirm our belief in complete segregation. We are determined to maintain it and to maintain law and order as it applies both to those who support segregation and to those who oppose it." p. 12, col. 4.

[10] *Southern School News,* May, 1957, Vol. III, No. 11, on April 8, Circuit Judge James A. Hare said: ". . . despite federal rulings, segregation matters will be handled at the local level." In charging a Dallas County grand jury, the Black Belt judge said he would "advise our colored friends who follow the false hopes of integration to go where their hopes lead them." "Since the Supreme Court decision of 1954", Hare said, "more segregation laws have been passed than in the previous 150 years." p. 5, col. 2. The trial judge in the instant proceedings has been especially outspoken in his support for racial segregation and condemnation of petitioner (see *infra* at p. 40).

[11] Nullification Resolution: Acts of Ala. Spec. Sess. 1956, Act 42, at 70. Resolution petitioning Congress to limit the jurisdiction of the U. S. Supreme Court and other federal courts on appeals from state courts: *Southern School News,* Vol. 1, No. 7, p. 3. Report of a special legislative committee calling for a private school plan and a threat of economic reprisals: *Southern School News,* Vol. 1, No. 3, p. 2. In the following issues of *Southern School News* there are reports of resolutions and legislation defying the Constitution of the United States: Vol. IV, No. 1, July, 1957; Vol. III, Nos. 1-12, July, 1956-June, 1957; Vol. II, Nos. 1-12, July, 1955-June, 1956; Vol. I, Nos. 1-10, Sept., 1954-June, 1955. "Status of School Segregation-Desegregation in the Southern and Border States." *Southern Education Reporting Service,* April 15, 1957, p. 3.

employment and other forms of economic reprisals have accompanied legislation intended to punish financially those persons who advocate orderly compliance with the law as well as those who advocate equal rights for all. Violence and bloodshed have been predicted by high state officials if segregation is ended. Threats and actual acts of violence have been directed against Negroes who seek to assist their constitutional rights [12] as well as against whites who seek compliance with the law.[13] While Negroes have been

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[12] Year-long series of bombings and shootings of Negro leaders in bus segregation issue. *Southern School News,* Feb., 1957, Vol. III, No. 8, p. 15.

In Montgomery, 19 major acts of violence—9 bombings and 10 shootings—were directed against buses, or the homes of Negro leaders. *Southern School News,* March, 1957, Vol. III, No. 9, p. 12.

In Montgomery, Dec., 1956, one Negro woman was hit in both legs by bullet during firing on buses. *Southern School News,* Jan., 1957, Vol. III, No. 7, p. 14.

In Birmingham, the home of Rev. F. L. Shuttlesworth, a Negro leader of the bus boycott, was bombed. *Southern School News,* Jan., 1957, Vol. III, No. 7, p. 14.

In Montgomery, four Negro churches were bombed. Also the homes of two ministers, both leaders in bus boycott, one leader white and one Negro. A Negro cab stand was blasted. An attempt was made to bomb home of Rev. M. L. King. *Southern School News,* Feb., 1957, Vol. III, No. 8, p. 15.

Ku Klux Klan activity, demonstrations, and cross burnings, were reported in Opelika, Montgomery, Mobile, Birmingham, Prattville and other Alabama communities. *Southern School News,* Jan. 1957, Vol. III, No. 7, p. 15; Feb., 1957, Vol. III, No. 8, p. 15; March, 1957, Vol. III, No. 9, p. 13; June, 1957, Vol. III, No. 12, p. 13; Dec., 1956, Vol. III, No. 6, p. 13.

In Birmingham, Rev. F. L. Shuttlesworth was physically attacked when he attempted to enroll Negro students in an all-white school. *N. Y. Times,* Sept., 10, 1957, p. 1, col. 3.

In Birmingham, two false bombing reports at Phillips High School and student demonstrations at Woodland High School followed reports that Negro students would attempt to enroll at these schools. *N. Y. Times,* Sept. 11, 1957, p. 23, col. 3.

[13] In Birmingham, a white steel worker (Lamar Weaver) was attacked on March 6, 1957 by a crowd of white men after he sat beside a Negro couple in a Birmingham railroad station. Weaver, who

refused official protection from threats of physical violence, where Negroes have protested against deprivation of their rights, state officials have been quick to curb this "lawless" activity.[14] Other pressures have been exerted on Negroes to maintain "voluntary" segregation. Alabama officials have committed themselves to a course of persecution and intimidation of all who seek to implement desegregation. Negroes who seek to secure their constitutional rights do so at the peril of intimidation, vilification, economic reprisals, and physical harm.

It is in this climate that the instant proceedings took place. In view of petitioner's seeking the elimination of racial segregation and other barriers of race, its attempted suppression by state authorities was all but inevitable. With whatever cloak of legality respondent may seek to invest these proceedings, the due process accorded petitioner should be viewed against a background of open opposition by state officials and an atmosphere of violent hostility to petitioner and its members. It is only in this context that these proceedings can be properly measured to test their fundamental validity. So viewed and considered, the unconstitutionality and illegality of these proceedings will be unmistakably revealed.

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has made pro-integration speeches, escaped in his car in a storm of heavy stones. He was struck in the face with a suitcase, windows of the car were shattered. *Southern School News,* April, 1957, Vol. III, No. 10, p. 13.

The home of a white minister was bombed. *Southern School News,* Feb., 1957, Vol. III, No. 8, p. 13.

[14] *Southern School News,* August, 1957, Vol. IV, No. 2, Att. Gen. John Patterson, in a statement issued after raids on the Tuskegee Civic Association and a Tuskegee print shop: "[The investigation] was undertaken due to the illegal operations of the TCA, due to the racial trouble and strife the organization is stirring up in Macon County and due to certain individuals connected with the said organization who have connections with foreign organizations whose purposes and aims are not in the best interests of the welfare of this state. Such a boycott as is being carried out by the TCA is in violation of the laws of this state and cannot be tolerated. Certain foreign organizations that are bent upon stirring up racial strife and disorder in our state have been instrumental in bringing about this illegal boycott." p. 4, col. 4.

Summary of Argument

Petitioner has been adjudged in contempt, fined $100,000 and ousted from Alabama—solely because petitioner and its members seek to obtain for Negro Americans "what they think is due them" under our system of government. *United States* v. *Harriss*, 347 U. S. 612, 633, 635 (Justice Jackson dissenting).

Petitioner is a voluntary association whose primary objective, as its name implies, is improvement of the status of colored people in the United States. It was organized in 1909 and incorporated under the laws of the State of New York as a membership, non-profit corporation in 1911. Today petitioner is a national organization and has affiliated local units in Alaska and the 48 states. Petitioner does not advocate violence to further its aims; it espouses no subversive or alien ideology; it fosters no social or political reforms adverse to the interests of the United States. On the contrary, it seeks to nourish faith in the perdurance of our democratic institutions.

Petitioner is a political organization, and in seeking to improve the Negro's status through democratic processes, petitioner and its members are exercising rights of free association and free speech basic to our society.

From the rationale distilled from the decisions of this Court, petitioner and its members have the protection of the Fourteenth Amendment to pursue these activities free from state encroachment. See *e.g., United States* v. *Rumley*, 345 U. S. 41; *DeJonge* v. *Oregon*, 299 U. S. 353; *Thomas* v. *Collins*, 323 U. S. 516; *Wieman* v. *Updegraff*, 344 U. S. 183, 194, 195; *Terminiello* v. *Chicago*, 337 U. S. 1; *Sweezy* v. *New Hampshire*, 354 U. S. 234. Cf. *Burstyn* v. *Wilson*, 343 U. S. 495; *Watkins* v. *United States*, 354 U. S. 178.

Petitioner asserts here its own right to freedom of association and free speech, as well as that of its members and contributors. See *Sweezy* v. *New Hampshire*, *supra*,

at 250, 251; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 149, 183. Since loss of memberships and contributions are also involved, it claims property rights as well. See *Pierce* v. *Society of Sisters*, 268 U. S. 510.

Alabama alleges in these proceedings the right to restrain all activities of petitioner and its members and the right to punish petitioner in contempt for refusing to submit to state interference with its right of free speech and association. The justification for restraint of petitioner's activities was that it had failed to qualify to do business in the state in accordance with state law and that injunctive relief was essential to protect the state's welfare (R. 2). Even conceding this to be a bona fide state interest does not dispose of the issues which these proceedings raise. Petitioner and its members seek to implement in Alabama rights secured by the federal Constitution, and a state cannot bar such activity altogether on the pretext of securing compliance with state law. Cf. *Hill* v. *Florida*, 325 U. S. 538; *Garner* v. *Teamsters C. & H. Union*, 346 U. S. 485, 500; *Thomas* v. *Collins*, *supra*; and see *Theard* v. *United States*, 354 U. S. 278. That the state's real aim is not petitioner's registration with the Secretary of State, but petitioner's ouster, is crystal clear. Moreover, there is nothing in the state's bill of complaint or in the record to justify the circuit court in issuing its injunctive decree without first according petitioner an opportunity to be heard.

The interlocutory order requiring petitioner to disclose to the state the names and addresses of its members, disobedience of which gave rise to petitioner's contempt citation, was an unwarranted and arbitrary invasion of an area of personal freedom immune from inquisition by political authorities. See *Watkins* v. *United States*, *supra*; *Sweezy* v. *New Hampshire*, *supra*; *United States* v. *Rumely*, *supra*, at 57; *National Labor Relations Board* v. *Essex*

Wire Co., 245 F. 2d 589 (9th Cir. 1957); *National Labor Relations Board* v. *National Plastics Products Co.*, 175 F. 2d 755, 760 (4th Cir. 1949).

Moreover, the order of the trial court requiring disclosure of petitioner's members, granted ostensibly to aid the state in its preparation for a trial on the merits, was entered before it could have been determined that such proceedings would ever be necessary.

The truth is that Alabama seeks, in these proceedings, to silence petitioner and its members. Its purpose is to eradicate effective opposition to continued governmental maintenance of racial segregation by insulating the state's unconstitutional policy against the reach of the Fourteenth Amendment. Obviously mere state opposition to petitioner's aims and purposes cannot vindicate the state power here asserted, for the reason free speech is constitutionally guaranteed is to preserve the freedom of those in dissent, no matter how weak and unpopular, under the circumstances and conditions now prevalent in Alabama.

The contempt citation and the punishment imposed therefor were vindicative and arbitrary, as indeed were the entire proceedings. Petitioner is subjected to heavy penalties for seeking to protect its constitutional rights. Petitioner's action in this cause poses no threat to the administration of justice in Alabama, and these proceedings present no valid issue of that nature. Here the state used its judicial machinery to try to convict petitioner for the ideas it espouses and lawfully seeks to implement. The state's aim was to ban petitioner's activities by the pretense of a judicial procedure, and that is the vice of these proceedings. There was lacking a fair and impartial hearing as required by the due process clause of the Fourteenth Amendment. The judgment below therefore cannot be sustained.

ARGUMENT

I.

The Fourteenth Amendment Prohibits the State From Interfering With the Activities of Petitioner.

Petitioner and its members seek the "economic, political, civic and social betterment of colored people and their harmonious cooperation with other peoples" [15] in Alabama and throughout the United States. In seeking to attain these objectives through the petitioner organization, individual members are exercising the right of free association for their mutual protection and for the more effective advancement of group interests—a right fundamental to our society. See *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1, 33.

In advocating and seeking the betterment of the Negro's status in America petitioner and its members are merely invoking their constitutionally protected rights of free speech and free association guaranteed under the due process clause of the Fourteenth Amendment. See *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Sweezy* v. *New Hampshire*, 354 U. S. 234; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Times-Mirror Co.* v. *Superior Court*, 314 U. S. 252; *Pennekamp & Miami Herald Publishing Co.* v. *Florida*, 328 U. S. 331; *National Broadcasting Co., Inc.* v. *United States*, 319 U. S. 190; *Burstyn* v. *Wilson*, 343 U. S. 495; *DeJonge* v. *Oregon*, 299 U. S. 253; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 149, 183 (concurring opinions).

Solution of the American race problem—one of the great social issues of this era—is the cause to which petitioner and its members are devoting their efforts and energy. The right to free discussion of the problems of

[15] This is quoted from Article 2, Constitution and By-laws of Branches of NAACP, March, 1956.

our society and to engage in lawful activities aimed at their alleviation is one of the unique and indispensable requisites of our system. See *Pennekamp* v. *Florida, supra,* at 346; *Palko* v. *Connecticut,* 302 U. S. 319, 327; *Stromberg* v. *California,* 283 U. S. 359, 369. The fact that some may view the ideas petitioner and its members espouse as ill-advised or even infamous is of no moment. For the right of freedom of association and free speech is accorded to dissident and unpopular minorities as well as those advocating ideas or engaging in activities of which those in power approve. See *Thornhill* v. *Alabama,* 310 U. S. 88; *Niemotko* v. *Maryland,* 340 U. S. 268; *Pierce* v. *Society of Sisters, supra; Hague* v. *Congress of Industrial Organization,* 307 U. S. 496; *Sweezy* v. *New Hampshire, supra; cf. Watkins* v. *United States,* 354 U. S. 178. The unimpaired maintenance of freedom of association and free speech is considered essential to our political integrity, see *Whitney* v. *California* (Justice Brandeis concurring), 274 U. S. 357, 376; *Stromberg* v. *California, supra;* and their safeguard in our basic law postulates a belief in the fundamental good sense of the American people.[16] In sum, petitioner and its members are exercising fundamental rights and engaging in activities basic to a free society.

It is clear that an individual who merely seeks vindication of his constitutional rights or improvement of his economic, social and political status by lawful means can-

[16] Justice Holmes' opinion in Abrams v. United States, 250 U. S. 616 at 630 is an expression of this idea: "But when men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by a free trade in ideas." It was undoubtedly belief in the vital importance, both political and nonpolitical, of free speech which led this Court after some hesitation to construe the Fourteenth Amendment as incorporating against the states the First Amendment's proscription. *Compare* Patterson v. Colorado, 205 U. S. 454; Gilbert v. Minnesota, 254 U. S. 325; Prudential Insurance Co. v. Cheek, 259 U. S. 530 *with* Gitlow v. New York, 268 U. S. 652 and Stromberg v. California, 283 U. S. 359.

not be held guilty of illegal conduct. And the fact that such activity is taken in concert, of course, does not render it illegal. See *International Union* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 258.

While petitioner eschews partisan politics, it seeks to influence public opinion and affect the political structure to achieve its objectives. As such it is a political organization in the true sense, with its activities outside the area dissident and unpopular minorities, as well as those advo- of state interference absent compelling justification.[17] See *United States* v. *Rumely*, 345 U. S. 41; *Watkins* v. *United States, supra* at 250-251; *Wieman* v. *Updegraff*, 344 U. S. 148, 196; *Sweezy* v. *New Hampshire, supra*, at 265, 266.

In *Sweezy* v. *New Hampshire, supra*, at 250, 251, Mr. Chief Justice Warren said:

> Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of political thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

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[17] Petitioner also aids Negroes in vindicating their constitutional rights of freedom from discrimination in courts. In so far as these activities involve the federal courts, there is a further serious question of state jurisdiction to prohibit or interfere in any way. *See* Theard v. United States, 354 U. S. 278.

Mr. Justice Frankfurter in *Wieman* v. *Updegraff, supra,* characterized membership in a club of a political party as "a right of association peculiarly characteristic of our people," and joining such an organization as an exercise of rights of free speech and free inquiry. More recently in *Sweezy* v. *New Hampshire, supra,* Mr. Justice Frankfurter has given expression to the fundamental nature of activities in political organizations. There he said at page 266 that in the political and academic realm, "thought and action are presumptively immune from inquisition by the political authority." And at another point in the same opinion (265), Mr. Justice Frankfurter stated:

> The inviolability of privacy belonging to a citizen's political loyalties have so overwhelming an importance to the well being of our kind of society that it cannot be constitutionally encroached upon on the basis of so meager a countervailing interest of the State as may be argumentatively found in the remote, shadowy threat to the security of New Hampshire allegedly presented in the origins and contributing elements of the Progressive Party and in petitioner's relations to these.

That group activity plays a vital role in the enactment of legislation, conduct of party activity, formulation and execution of public policy in public administration and the protection of civil liberties is no longer open to question. See Latham, "The Group Basis of Politics," (1950) *passim.* Indeed, petitioner and organizations of its character at times bridge the academic and political fields, for they often seek to concretize the academician's social and economic abstractions into governmental action through their influence upon political parties and office holders. It is submitted, therefore, that these aforementioned principles are particularly apposite here, and that their application necessarily renders these proceedings invalid.

It should be noted that petitioner solicits membership dues and financial contributions to aid in carrying on these

activities. That alone, however, cannot place petitioner's activities outside the protection which the Fourteenth Amendment affords. *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Follett* v. *McCormick,* 321 U. S. 573; *Burstyn* v. *Wilson, supra.*

While some nondiscriminatory regulation of petitioner's activities might be permissible, a blanket prohibition is beyond the state's power. See *Thomas* v. *Collins,* 323 U. S. 516; *Burstyn* v. *Wilson, supra; International Brotherhood of Teamsters* v. *Vogt, Inc.,* 354 U. S. 284. The restraining order entered in this cause constitutes such a forbidden regulation which cannot be sustained.

Nor can a blanket restraint be justified on the ground that petitioner's activities are at variance with some legitimate state policy. Cf. *Hughes* v. *Superior Court,* 339 U. S. 460. For such a proscription as here imposed would seem to constitute a prior restraint upon the exercise of rights of free speech and association forbidden by the Fourteenth Amendment. See *Near* v. *Minnesota,* 283 U. S. 697; *Kingsley Books* v. *Brown,* 354 U. S. 436, 445; *Roth* v. *United States,* 354 U. S. 476, 496, 497.

The sole legal basis urged for the state's interference with petitioner's activities was its failure to register with the Secretary of State as a foreign corporation doing business in Alabama. See Title 10, Sections 192, 193, 194, Code of Alabama, 1940. There can be no doubt that the state cannot upon this pretext justify interference with free speech and freedom of association. A mere semblance of a state interest is not sufficient to justify invasion of the rights of free association and free speech. See *United States* v. *Rumely, supra; Watkins* v. *United States, supra,* at 198. And, it is submitted, the state cannot interpose its policy or procedure for the purpose of defeating or infringing constitutionally secured federal rights. See *Hill* v. *Florida,* 325 U. S. 538; *Garner* v. *Teamster C. H. Union,* 346 U. S. 485, 500. Restriction upon exercise of petitioner's consti-

tutionally protected right to advocate and seek by lawful means equal rights for Negro Americans, therefore, cannot be justified on the ground that compliance with state registration statutes was being sought, particularly in light of petitioner's offer to so comply and waive its asserted immunity to the state law.

The order to disclose the names and addresses of petitioner's members entered by the court below in the supposed exercise of its equity power and the use of pre-trial discovery for this purpose was sustained on the merits by the Alabama Supreme Court (R. 23). Aside from being a gross misuse of the power of equity and pre-trial discovery procedures (see *infra* pages 44 *et seq.*), this order was as open and direct a violation of the rights of petitioner and its members to free speech and freedom of association as directly barring petitioner's activities without more. This, we submit, the state cannot do whether acting through its legislative, executive or judicial arm. See *Sweezy* v. *New Hampshire, supra; Watkins* v. *United States, supra.*

In Alabama, at present, adverse sentiment to desegregation had been manifested by both state and local officials and powerful forces in the dominant majority. Petitioner's members constitute a weak and unpopular minority—a minority defined not so much by race as by the ideas they espouse. Disclosure of petitioner's members or threat of such disclosure will necessarily tend to curb the activities of petitioner and its members and weaken the strength and effectiveness of the organization in pursuit of its objectives in Alabama. See Mr. Justice Black concurring in *United States* v. *Rumely, supra; cf. Sweezy* v. *New Hampshire, supra.*

The purported justification for the request for disclosure, and the order requiring it, was that the state needed petitioner's membership list to secure facts to prove that petitioner had been doing business in the state.

But the factors which determine that question concern what activities petitioner has engaged in, not the identification of its members and contributors. See *DeJonge* v. *Oregon, supra;* cf. *Wieman* v. *Updegraff, supra.* A simulated state interest will no more suffice to justify this type of invasion of the Bill of Rights than those condemned in *Sweezy* v. *New Hampshire, supra; Watkins* v. *United States, supra,* and *United States* v. *Rumely, supra.* Indeed, since here the judicial process is involved, the requirements of due process are, if anything, more stringent.

Because unpopular organizations lawfully engaged in pursuit of their activities are subject to coercive influences effectively restricting exercise of their rights, the National Labor Relations Board and the courts have held the right of self-organization under the Labor Management Relations Act violated where an employer sought disclosure of union membership and activities of individual employees. See, e.g., *National Labor Relations Board* v. *National Plastics Products Co.,* 175 F. 2d 755, 760 (4th Cir. 1949); *Texarkana Bus Co.* v. *National Labor Relations Board,* 119 F. 2d 480 (6th Cir. 1941). In *National Labor Relations Board* v. *Essex Wire Co.,* 245 F. 2d 589 (9th Cir. 1957), the court upheld the order of the National Labor Relations Board that the demand by management for surrender of executed union membership cards was an unfair labor practice. There it said at page 592:

> Assuming that the cards were demanded in an effort to enforce the rule against union campaigning on company time, and that the foreman intended to return the cards at the end of the day, we are nevertheless of the view that the demand was coercive with respect to the rights specified in § 7 of the act.
>
> Possession of such cards, even for a temporary period, would enable management to inform itself as to the progress being made in campaigning for a then-unrepresented union. It would also make it possible for management to exercise surveillance over the union affiliations and activities of individual

> employees. Whether the company would be disposed to make such use of the cards is beside the point. As long as the opportunity is present, employees may have a real fear that this would be done. Such fear could well influence their inclination to execute such cards.
>
> * * *
>
> . . . In our view, a demand for surrender of membership cards in a union not then established in the plant is at least as coercive as such remarks and questioning.
>
> We are therefore of the view that the demand . . . was an unfair labor practice. . . .

While inquiries about union strength are permissible, inquiries about the union affiliation of individual employees or the union activities of union leaders are prohibited as an unfair labor practice. *National Labor Relations Board* v. *Minnesota Mining and Mfg. Co.*, 179 F. 2d 323 (8th Cir. 1950); *In re Grater Mfg. Co.*, 111 NLRB No. 20 (1955).

In *Brotherhood of Railway and Steamship Clerks* v. *Virginia Ry. Co.*, 125 F. 2d 853, 858 (4th Cir. 1942), the court said: "[C]ertainly the [National Mediation] Board should no more have given publicity to the names of those who had given authorization cards to the [union] and thus have subjected them to the danger of reprisal or discrimination, than it should have disclosed the votes of those participating in an employees' election."

While these are Congressional statutes and hence demonstrate a legislative condemnation of interference with the group activity sanctioned, the basis for the legislative proscription is the plenary power of Congress over interstate commerce. Here the rights to which the group activity is directed are rights created and protected by the Fourteenth Amendment itself. It follows necessarily, therefore, that state interference with the exercise of these rights cannot be permitted. Thus, the reasons which condemned enforced exposure of union members as violating the

national Labor Management Relations Act forbid disclosure of petitioner's members names; the coercive effect and the unlawful interference with speech and association are the same. Disclosure could serve no other purpose.

As the state is barred from inquiries concerning an individual's partisan political affiliation, see *Sweezy* v. *New Hampshire, supra*, it is likewise barred from inquiries concerning his stand on political issues or affiliations which would reveal what these political views are—e.g., does he support civil rights legislation? or believe that curbs on immigration should be relaxed? or what position does he hold on public power, or on repeal of Taft-Hartley? or what are his beliefs on segregation? or does he belong to a group which is opposed to segregation? To borrow a phrase from Mr. Justice Frankfurter in *Sweezy* v. *New Hampshire, supra* such inquiries could only act to "check the ardor and fearlessness" of the individual in the active participation in activities designed to solve great public issues of importance to his generation. This order seeks to effect an invalid intrusion into an area of individual and group freedom from which the due process clause of the Fourteenth Amendment bars the state.

To paraphrase Mr. Justice Black, concurring in *United States* v. *Rumely, supra*, at 57, once the state can demand of petitioner the identification of its members, the spectre of the police will look over the shoulder of every member who belongs to the organization. A contribution or purchase of a membership today may result in a subpoena tomorrow. The consequences of such disclosure would be necessarily coercive, and freedom of association as we know it would disappear.

There are, of course, instances where invasion of free speech is permitted. Where questions of loyalty or subversion are involved, such invasion has been permitted. See

Dennis v. *United States*, 341 U. S. 494. In those cases the intrusion was permitted because it was found that there was a rational basis for inquiry into the individual's membership in subversive organizations in order to protect the integrity of public employment, *Garner* v. *Board of Public Works*, 341 U. S. 716; or to keep interstate commerce free from obstruction, *American Communications Association* v. *Douds*, 339 U. S. 382; or to protect the state from violent overthrow, *Dennis* v. *United States, supra*. Further, when the activity involved offends some valid state policy, state interference has been allowed. See *Hughes* v. *Superior Court, supra*.

But these cases have no application here. Petitioner is engaged in no acts of disloyalty or subversion. It merely seeks the eradication of state imposed racial segregation and discrimination. Since the Constitution forbids such discrimination, justification for restricting petitioner's activities, although at war with avowed state policy, is totally lacking. As this Court held in *Garner* v. *Teamsters, C. & H. Union, supra*, federal power constitutionally exerted "cannot be curtailed, extended or circumvented" merely because some state policy or doctrine is opposed to it. Indeed, since petitioner and its members were exercising and seeking to secure only those rights guaranteed by the federal Constitution, these activities are impliedly protected against the erection of state burdens which would impair or nullify those federal rights. See *Hill* v. *Florida, supra*.

There has long been full agreement on this Court that interference with freedom of speech and freedom of association by governmental authority cannot be justified, except where compelling necessity requires the protection of some competing societal interest of substantial importance. This is merely recognition that some limitation of these freedoms may be necessary in an organized society.

Where the lines of demarcation should be drawn, however, has been the subject of much controversy, and this Court's decisions on the reach of the First Amendment guarantees are difficult to harmonize under any single formula. Compare *Martin* v. *Struthers*, 319 U. S. 141, and *Murdock* v. *Pennsylvania, supra*, with *Follett* v. *McCormick, supra*, and *Breard* v. *Alexandria*, 341 U. S. 622 (itinerant peddlers of religious literature); *Zorach* v. *Clauson*, 343 U. S. 306, with *McCollum* v. *Board of Education*, 333 U. S. 203 (released time); *Kovacs* v. *Cooper*, 336 U. S. 77, with *Saia* v. *New York*, 334 U. S. 558 (use of sound trucks); *Terminiello* v. *Chicago*, 337 U. S. 1, and *Feiner* v. *New York*, 340 U. S. 315 (right of police authorities to interfere with free speech as likely to produce a breach of the peace). Each of these decisions turns upon an ultimate appraisal of the facts. The cases, however, seem amenable to a loose classification, viz., interference with exercise of these rights has been prohibited except where this Court has found the restriction necessary for the preservation of some important societal interest. See *Breard* v. *Alexandria, supra; Feiner* v. *New York, supra*. Where no such importance has been discovered, however, the restriction has been struck down. See *Saia* v. *New York, supra*.

Until such time as the state has a rational basis to support regulation of the activities of petitioner and its members as necessary for the prevention of some substantive evil which the state has a right to prevent, it cannot interfere by legislative enactment or judicial decree with the activities of petitioner and its members in their effort to secure social, economic or political reform to which petitioner and its members are committed. See *Sweezy* v. *New Hampshire, supra; Thomas* v. *Collins, supra;* cf. *Gitlow* v. *New York*, 268 U. S. 652; *American Communications Assn.* v. *Douds, supra; United Public Workers* v. *Mitchell*, 330 U. S. 75.

Here petitioner asserts its own right and the rights of its members to freedom from interference with the exercise of precious constitutional liberties. By enjoining its continued activity, Alabama has deprived petitioner of freedom of speech and freedom of association and of property in the continued receipt of the dues and contributions of its members. Petitioner has standing to assert its interest as an entity, see *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra* (Mr. Justice Frankfurter's concurring opinion at 149); *Pierce* v. *Society of Sisters, supra;* and may vindicate the constitutional right of freedom of speech and freedom of association of its members as well. See *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra* (Justice Jackson's concurring opinion at 183); *Watkins* v. *United States, supra* at 250, 251. This Court has more than once permitted a litigant to safeguard constitutional rights of persons far more removed than is petitioner in relation to its members. See *Pierce* v. *Society of Sisters, supra; Barrows* v. *Jackson,* 346 U. S. 249; *Truax* v. *Raich,* 239 U. S. 33.

II.

Purporting to Enforce Its Foreign Corporation Registration Statutes, the State Has Here Acted to Prohibit Petitioner and Its Members from Exercising Rights Guaranteed by the Fourteenth Amendment.

The purported basis for the state's action was failure of the petitioner to file with the Secretary of State its Articles of Incorporation and designate an agent for service of process in accord with Title 10, Sections 192, 193 and 194 of the Code of Alabama, 1940 and Article 12, Section 232, Constitution of Alabama of 1901. This failure and petitioner's continuing to engage in activities designed to secure constitutional rights of Negroes in the state was allegedly causing irreparable injury to the property and

civil rights of citizens of the state. On the basis of the bare unsupported allegations in the complaint—which to an objective and unbiased appraiser would hardly furnish the basis for exercise of equity's extraordinary power—petitioner was placed under sweeping restraint without hearing.

The pleading of the state registration statutes was a pretext to give a facade of legality to the state's unlawful and unwarranted interference with the lawful activities of petitioner and its members in violation of the Fourteenth Amendment's command. The purpose of Title 10, Sections 192, 193 and 194 is to compel foreign corporations to submit to the jurisdiction of the courts of the state as a prerequisite to invoking equal protection of the laws in the enforcement of intrastate obligations. *Jones* v. *Martin,* 15 Ala. App. 675, 74 So. 761 (1917). It is designed to protect property interests of Alabama citizens. *Jefferson Island Salt Co.* v. *Longyear Co.,* 210 Ala. 352, 98 So. 119 (1923). See *Pepperell Mfg. Co.* v. *Alabama Nat'l. Bank,* 261 Ala. 665, 75 So. 2d 665 (1954); *Cadden-Allen Inc.* v. *Trans-Lux News,* 254 Ala. 400, 48 So. 2d 428 (1950). Here the state knew where petitioner's main office was located. It so recites it in the complaint, and there is no showing that any Alabama citizens had sought to bring an action against petitioner in the state court and had been unsuccessful because of petitioner's failure to comply with the statutes. In short, petitioner's failure to register had caused none of the harm or deprivations to Alabama citizens which the law was designed to eliminate.

There is doubt as to the statute's application to petitioner, since petitioner is engaged in interstate commerce. Cf. *Spector Motor Service* v. *O'Connor,* 340 U. S. 602. If the state's thesis is to be accepted, however, petitioner has been continuously present in Alabama since 1918 when its first Branches were chartered in Selma and Montgomery (R. 6-7). Since that time it has continuously engaged in activities seeking to protect Negroes against denial of rights

because of race and to remove barriers of discrimination based upon color. In the course of that effort, petitioner has assisted in prosecuting or defending in courts litigation in which such questions were raised. Among these cases are *Mitchell* v. *Wright*, 154 F. 2d 580 (5th Cir. 1946); *Gayle* v. *Browder*, 142 F. Supp. 707 (M. D. Ala. 1956), aff'd, 352 U. S. 903. The state's enforcement authorities have failed to proceed against petitioner from 1918-1956, and from this failure there is at least a presumption that they did not construe the registration statute as being applicable to petitioner.

The form of remedy sought by the state is a conclusive demonstration that compliance with the statute was not the state's purpose. The state did not seek to require petitioner to register, as the statute provides, but to restrain all of its activities and secure its ouster from the state. The decree entered barred compliance with the statute's terms, and petitioner's offer to comply, which should have ended the lawsuit, was not allowed by the court.

In *quo warranto* proceedings to forfeit corporate charters (which "award relief of like character to that sought by injunction . . . ", *Birmingham Bar Association* v. *Phillips and Marsh*, 239 Ala. 650, 658, 196 So. 725 (1940)) Alabama courts have been disinclined to decree forfeiture for mere technical violations, *State* v. *Oden*, 248 Ala. 39, 26 So. 2d 550 (1946); or for violations which are not substantial or clear, *State ex rel. Johnson* v. *Southern Building and Loan Association*, 132 Ala. 50, 57, 31 So. 375 (1902); moreover, it has been required that the violation be willful and shown to have prejudiced a citizen of the state or other person. *State ex rel. Scott* v. *United States Endowment and Trust Co.*, 140 Ala. 610, 620, 37 So. 442 (1903).

Further, it is clear from the state's motion for an order requiring the disclosure of petitioner's membership and the court's order to that effect that what actually was

sought was an effective curb upon petitioner's activities. If petitioner had complied with the state's law, which is the purported basis for these proceedings, it would not be required to furnish the state any list of its members.[19] The

[19] Title 10, Sections 192, et seq., are as follows:

§ 192. *Foreign corporation must file instrument of writing designating agent and place of business in this state.*—Every corporation not organized under the laws of this state shall, before engaging in or transacting any business in this state, file with the secretary of state a certified copy of its articles of incorporation or association and file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this state and an authorized agent or agents residing thereat; and when any such corporation shall amend its articles of incorporation or association, or shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this state.

§ 193. *Where filed and fee for filing.*—Such instrument when filed by a corporation engaged in any business of insurance must be filed in the office of the superintendent of insurance, and when filed by a corporation engaged in any other business than that of insurance must be filed in the office of the secretary of state, and there shall be paid at the same time for filing such instrument to the officer with whom the same is filed the sum of ten dollars for the use of the state. (1919, p. 831.)

§ 194. *Unlawful for foreign corporation to transact business in this state before declaration filed; penalty.*—It is unlawful for any foreign corporation to engage in or transact any business in this state before filing the written instrument provided for in the two preceding sections; and any such corporation that engages in or transacts any business in this state without complying with the provisions of the two preceding sections shall, for each offense, forfeit and pay to the state the sum of one thousand dollars.

§ 195. *Unlawful to act as agent of foreign corporation before such declaration is filed; penalty.*—It is unlawful for any person to act as agent or transact any business, directly or indirectly, in this state, for or on behalf of any foreign corporation which has not designated a

statute merely requires furnishing the Secretary of State with Articles of Incorporation and naming an agent to accept service of process. Thus, in a lawsuit purportedly based upon petitioner's failure to comply with the state law, petitioner is ordered to do more than the statute requires. Indeed, if the justification for these proceedings was petitioner's failure to register, that justification was removed before the contempt adjudication by petitioner's tender of compliance with state law.

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known place of business in this state and an authorized agent or agents residing thereat, as required in this article; and any person so doing shall, for each offense, forfeit and pay to the state the sum of five hundred dollars.

§ 196. *Foreign corporations, their agents, officers, etc., contracting or doing business in state without license, penalty for.*—Any corporation or any person acting as agent, servant, or officer of such foreign corporation or nonresident corporation or corporation organized under or by authority of the laws of any state or government other than the State of Alabama, who shall make or attempt to make any contract, agreement, undertaking, or engagement with, by, or in the name of or for the use or benefit of any such corporation without a license authorizing such corporation to do business in this state, or after such license shall have been cancelled, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars, nor more than one thousand dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than twelve months, one or both, at the discretion of the jury trying the case.

§ 197. *Solicitor must enforce penalties; commissions.*—Every penalty provided for in this article shall be sued for and recovered in the name of the State of Alabama, by the solicitor of the circuit or county in which the offense is committed; and when collected, must be paid by the solicitor into the state treasury for the use of the state, less twenty-five percent, to be retained by such solicitor for his services. The attorney-general shall represent the state in such actions carried to the supreme court, and for his services therein is entitled to one-half the commissions herein allowed to the solicitor.

§ 198. *Exceptions.*—The provisions of this article do not apply to corporations organized under the laws of the United States; nor to corporations engaging in or transacting business of interstate commerce only within the state.

Further evidence of the real purpose of these proceedings is demonstrated by the scheduling of the hearing date on petitioner's motion to dissolve after hearing and determination of the state's motion for pretrial disclosure of petitioner's members. The motion to dissolve, not having been heard, and petitioner having been adjudged in contempt, petitioner is precluded from contesting the validity of the injunction now outstanding against it, until it has purged itself of contempt. *Jacoby* v. *Goetter Weil Co.*, 74 Ala. 427 (1883). The burdensome contempt penalty and the equally burdensome alternative of purging itself of contempt and disclosing its members, in effect places petitioner in position of not being able to challenge the restraining order. Thereby the temporary restraining order, entered *ex parte*, is rendered final and permanent. That this result was intended is hardly open to doubt.

The penalties for violation of the statutes here involved are criminal, and it is clear under Alabama law as elsewhere that equity will not assume jurisdiction to enforce statutory penalties, *Jarrett* v. *Hagerdorn*, 237 Ala. 66, 185 So. 401 (1939); or assume jurisdiction where a plain and adequate remedy exists at law. *Farmers Savings Bank* v. *Murphee*, 200 Ala. 574, 76 So. 932 (1917); *Hogan* v. *Scott*, 186 Ala. 310, 65 So. 209 (1914); *Hardeman* v. *Donaghey*, 170 Ala. 362, 54 So. 172 (1911); *Gulf Compress Co.* v. *Harris Cortner & Co.*, 158 Ala. 343, 48 So. 477 (1909); *Youngblood* v. *Youngblood*, 54 Ala. 486 (1875); *McCullough* v. *Walker*, 20 Ala. 389 (1852); *Herring* v. *M'Elderry*, 5 Port. 161 (1837). The state alleges "irreparable" injury, but no facts are asserted to warrant giving credence to this allegation. Thus, despite the fact that under principles of equity jurisdiction, no basis for equity intervention was shown, the trial court nonetheless asserted its equity power and proceeded to grant injunctive relief.

These factors all demonstrate that the proceedings below were deliberately and premeditatedly designed and utilized to impose restrictions and regulations upon exercise of rights of freedom of association and freedom of speech of petitioner and its members and lawful activities aimed at securing the constitutional rights and privileges of Negro Americans. For the reasons set forth in Part I hereof the proceedings below are, therefore, fatally defective and should be reversed.

III.

Taken As A Whole the Proceedings Were Lacking in Fundamental Fairness Essential to Our Concept of Due Process of Law.

1. The entire proceedings in the trial court and in the State Supreme Court are lacking in objectivity and impartiality which is the essence of due process. At no place in these proceedings does the litigation below present a picture of a court seeking to strike a fair balance between the interests of contending parties. Judicial discretion and interpretation of the rules of state procedure were here involved—in general, matters of state law. But where the exercise of judicial discretion and the interpretation of rules of procedure are at variance with fundamental notions of fairness, there is a failure to accord a hearing consonant with requirements of due process guaranteed under the Fourteenth Amendment. See *Walker* v. *Hutchinson*, 352 U. S. 112; *Betts* v. *Brady*, 316 U. S. 455; *Wolf* v. *Colorado*, 338 U. S. 25. Cf. *Galvan* v. *Press*, 347 U. S. 522, 530.

The state's complaint, even assuming the truth of all the allegations made, presents no such extraordinary set of cir-

cumstances as to warrant the exercise of equity jurisdiction. Title 10, Sections 194-196, Code of Alabama, 1940, which provides statutory penalties for a corporation doing business in violation of Alabama law, could have been invoked against petitioner for the alleged violation of the state's registration law. Of course, the state alleges that these remedies at law were inadequate. In view of the fact that the organization had chartered affiliates operating in Alabama since 1918, and had been operating its Southeast Regional Office in Birmingham since 1951 without protest by state authorities, even conceding a case for equity jurisdiction, *ex parte* proceedings seem entirely inappropriate[20] since the purpose of such proceedings is to issue restraints of short duration to maintain the *status quo*. Indeed, a restraining order issued *ex parte* is such a drastic interference with personal rights that it should be carefully utilized only in appropriate situations, else its use is of doubtful constitutionality. A restraining order, which alters rather than preserves the *status quo*, which is entered without the presence of those pressing considerations of possible irreparable injury before hearing can be had, which is entered because of violation of the law but enjoins compliance, and which is extended as here for an unreasonable length of time without hearing, fails to meet minimum constitutional requirements of notice and hearing. Cf. Rule 65, Federal Rules of Civil Procedure; *Sims* v. *Green*, 160 F. 2d 512 (3d Cir. 1947); *Southard & Co.* v. *Salinger*, 117 F. 2d 194 (7th Cir. 1941); *Benitez*

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[20] No question is raised, or indeed could be raised at this late date, concerning the trial court's authority in the abstract to issue temporary restraining orders ex parte in appropriate situations. *See* Rochell v. Florence, 236 Ala. 313, 182 So. 50 (1938).

v. *Anciani*, 127 F. 2d 121 (1st Cir. 1942); cert. denied 317 U. S. 699; *Mongogna* v. *O'Dwyer*, 204 La. 1030, 16 So. 2d 829 (1943); *Griffith* v. *State*, 19 S. W. 2d 377 (Tex. Civ. App. 1929); *Kittaning Brewing Co.* v. *American Natural Gas Co.*, 224 Penna. 129, 73 Atl. 174 (1909).

It is doubtful, moreover, that such proceedings would have been tolerated but for the fact that this petitioner was the defendant. The personal bias of the trial judge is clearly manifested in the March 4, 1957 issue of the *Montgomery Advertiser* in an article entitled "Off The Bench", where the trial judge said " 'I speak for the White Race, my race', because today it is being unjustly assailed all over the world. * * * The integrationists and mongrelizers do not deceive any person of common sense with their pious talk of wanting only equal rights and opportunities for other races. Their real and final goal is intermarriage and mongrelization of the American people." This bias is further evidenced in a speech delivered by him on July 11, 1957, before the Baptist Laymen in Alabama. The speech was reproduced in full in the Congressional Record of July 22, 1957. Two short excerpts only are necessary to reveal its character. There the judge said:

> Many of our religious organizations, the NAACP, and it has the financial and moral backing of the American Jewish Congress in New York, committees of labor unions, and the Supreme Court of the United States, and both of the Nation's chief political parties, are all working together to achieve complete integration of the races, and this we know is the first step toward amalgamation, the consolidating and fusing into 1 race the 2, the white and black races. A 5888, 5889, 103 Cong. Rec. (85th Cong. 1st Session) 1957.

and

> It is almost unbelievable, yet it is true, that the Presbyterian Church in one of our Southern States,

> underwrote the race mixing activities of the *Communist*-dominated NAACP . . . (italics supplied) *Ibid.*[21]

With a judge so personally committed, it can hardly be said that petitioner was tried in an objective forum as due process requires.

Under Alabama law when an injunction has been issued a motion to dissolve will lie and tests the equity of the bill, see *Corte* v. *State*, 259 Ala. 536, 67 So. 2d 782 (1953), and an appeal therefrom lies directly to the State Supreme Court. See Title 7, Section 757, Alabama Code of 1940; *Francis* v. *Scott*, 260 Ala. 590, 72 So. 2d 93 (1954). Petitioner was put under a sweeping injunction without a hearing. Its first responsive pleadings to the state's bill were a motion to dissolve and demurrers to the bill filed on July 2. Hearing on these pleadings were set for July 17. When the state subsequently filed, on July 5, a motion for pretrial discovery, however, hearing on its motion was set for July 9. The setting of hearing dates is in the realm of judicial discretion, but it hardly seems a fair or objective determination to give priority to a motion filed subsequent to that which will grant a defendant its first opportunity to a hearing to test the equity of a restraining order without notice and hearing.

After the state's motion was granted and petitioner was ordered to give to the state a list of its members, petitioner sought to demonstrate the irrelevance of the identity of its members to any germane issue in these proceedings by

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[21] The bill of complaint makes no charge of subversion, and petitioner challenges the state to prove the validity of such charge if it can. However else petitioner may be characterized, no responsible authority has ever leveled the charge of subversion.

filing an answer revealing in full its defense and offering to waive its rights not to register. Despite this, the court refused to vacate its order, and petitioner was put in the dilemma of either waiving its constitutional rights, as a condition precedent to a hearing on the merits in the Alabama courts and thereby exposing its members to danger, or being adjudged in contempt and thereby losing its standing to vindicate in the Alabama courts its rights to continue its activities free of state interference, until it had purged itself of contempt or the validity of contempt adjudication had been settled by higher authority. See *Jacoby* v. *Goetter Weil & Co., supra,* on which the State relies and with which interpretation the court concurred (see Brief in Opposition, p. 20). The alternatives available posed such unconstitutional conditions that petitioner was in effect denied access to Alabama courts to litigate its claims as to the invalidity of the court's restraining order.

The magnitude and vindictiveness of the fine levied on the adjudication of contempt, in total disregard of the non-profit character of the organization and its paucity of funds, is another evidence of the harsh treatment afforded petitioner and the absence of concern for petitioner's interest. Cf. *United States* v. *United Mine Workers*, 330 U. S. 258.

The fine itself was excessive and punitive and not warranted by the facts. Petitioner is a non-profit corporation with limited resources. Apparently the court believed otherwise, but there are no facts in the record or outside to justify that belief. It was clear that petitioner's refusal to obey the court's order was based upon its good faith belief that to do so would cause serious injury to its members and itself and would constitute a waiver of vital constitutional rights. The restraining order was being scrupu-

lously obeyed. Hence, there was no such public defiance as might give rise to any apprehension of a general undermining of judicial authority. Cf. *United States* v. *United Mine Workers of America, supra.*

On July 25, in the order adjudging petitioner guilty of contempt, the court ordered, "adjudged and decreed . . . as punishment for its said contempt, the said National Association for the Advancement of Colored People, be and it is hereby fined the sum of $10,000.00". On July 31, in its order adjudging petitioner guilty of further contempt, the order reads: "as punishment for its said contempt, the said National Association for the Advancement of Colored People, be and it is hereby fined the sum of $100,000."

If the order was made to induce obedience as in the nature of civil contempt, see *Ex parte Hill,* 229 Ala. 501, 158 So. 531 (1935); *Ex parte King,* 263 Ala. 487, 83 So. 2d 241 (1955), it is clear that a more reasonable fine would have been sufficient. The inordinate amount of the fine and the language in the order itself designating it as punishment for what had been done would seem to render this criminal rather than civil contempt under definition of Alabama authorities cited above. This is the prevailing rule and was the Alabama rule until this case reached the Alabama Supreme Court. The State Supreme Court in this case, however, set a new yardstick making the demarcation between civil and criminal contempt (R. 23).[22] Whether it is classified as civil or criminal contempt, the fine was levied without consideration of the fact that the consequences of petitioner's disobedience would not adversely undermine judicial authority, that the disobedience occurred to preserve constitutional rights, and that petitioner is a

[22] Since Title 13, Sec. 143, Alabama Code of 1940 limits court's powers to punish for criminal contempt to a fine of $50.00 or jail for 5 days, decision as to which category this adjudication could be classified was crucial.

non-profit corporation with limited financial resources. Cf. *United States* v. *United Mine Workers of America, supra.* There is some doubt as to whether petitioner can purge itself of contempt even if it could afford to pay the fine levied.

The Supreme Court of the State, although expressly recognizing certiorari as an appropriate remedy in denying petitioner's motion to stay the order of the trial court (91 So. 2d 220), after the petition was filed, denied relief on the ground that certiorari is not the proper remedy (R. 23). Thus, petitioner contends that it was denied a fair and impartial hearing in both state tribunals.

2. Since decision in this case, the rules of civil procedure of Alabama have been under comprehensive study and the State Commission on Judicial Reform has recommended "adoption of the Federal Rules of Civil Procedure to the Alabama practice" to insure greater liberality and freedom in litigation and avoid stringent technicalities of pleading and practice to meet the ends of justice. Skinner, "Alabama's approach to A Modern System of Pleading and Practice," 20 F. R. D. (Adv. pp. 119, 137, 1957).

At the time of these proceedings, although some of the federal rules in respect to pretrial discovery by interrogatories had been superimposed on Alabama procedure with adoption of Act 375, codified as Title 7, Sections 474(1)-474(18) (Supp. 1955), Title 7, Section 426, Alabama Code of 1940 governed disposition of the state's motion. Section 426 is a part of the restrictive and outmoded state procedure which the State Commission on Judicial Reform is seeking to jettison.

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[23] The new proposals have been approved by the lower House in the Alabama legislature, but approval has not as yet been given by the Senate.

A common feature of even the liberal discovery procedures, however, is a requirement that "good cause" be shown to obtain an order for discovery or inspection of private documents or papers. See, e.g., Federal Rule 34; 16 Ariz. Rev. Stat. R. 134 (1956); Ark. Stat. Ann. #28-356 (Supp. 1955); Colo. Rev. Stat. R. Civ. P. 34 (1953); 13 Del. Code Ann. Ch. Ct. R. 34 (1953); 30 Fla. Stat. Ann. R. Civ. P. 1.28 (1956); La. Rev. Stat. #13.3782 (Supp. 1954); Mo. Ann. Stat. #510.030 (1952); Wash. Ct. R. 34.

And this requirement has been reinforced by judicial decisions. See e.g., *State* v. *Hall*, 325 Mo. 102, 27 S. W. 2d 1027 (1930); *State* v. *Aronson*, 361 Mo. 535, 235 S. W. 2d 384 (1950); *Kullman, Salz & Co.* v. *Superior Court*, 15 Cal. App. 276, 114 P. 589 (1911); *Toth* v. *Bigelow et al.*, 12 N. J. Super. 359, 79 A. 2d 720 (1951); *Shell Oil Co.* v. *Superior Court of Los Angeles County et al.*, 109 Cal. App. 75, 292 P. 531 (1930); *Martin* v. *Capital Transit Co.*, 170 F. 2d 811 (C. A. D. C. 1948); *Carden* v. *Ensminger*, 329 Ill. 612, 161 N. E. 137 (1928); *Firebaugh* v. *Traff*, 353 Ill. 82, 186 N. E. 526 (1933); *State* v. *Flynn*, 257 S. W. 2d 69 (S. Ct. Mo. 1953); *Gebhard* v. *Isbrandtsen Co.*, 10 F. R. D. 119 (S. D. N. Y. 1950); 7 Cyclopedia of Federal Procedure, 609-610 (3rd ed., 1951) and cases cited. Cf. *Ex parte Darring*, 242 Ala. 621, 70 So. 2d 564 (1942); *Steverson* v. *W. C. Agee & Co.*, 13 Ala. App. 448, 70 So. 298 (1915).

As part of the requirement of good cause, many courts require that the party seeking discovery demonstrate that he cannot obtain the information sought by means other than discovery. *Szubinski* v. *Commercial Sash & Door Co.*, 15 F. R. D. 274, 276 (N. D. Ill., 1953); *Goldner* v. *Chicago & N. W. Ry. System*, 13 F. R. D. 326 (N. D. Ill., 1952); *Gebhard* v. *Isbrandtsen Co., supra; Drake* v. *Herman*, 261 N. Y. 414, 185 N. E. 685 (1933); *Patterson* v. *Southern Ry. Co.*, 219 N. C. 23, 12 S. E. 2d 652 (1941); see 4 Moore's Federal Practice, 2451 (2d ed. 1950), and cases cited.

Some jurisdictions with liberal pre-trial discovery procedures require that a party seeking the production of documents demonstrate that the papers sought are *relevant* to some material issue in the case. See, *e.g.*, *Royster* v. *Unity Life Ins. Co.*, 193 S. C. 468, 8 S. E. 2d 875 (1940); *Flanner* v. *St. Joseph Home for Blind Sisters*, 227 N. C. 342, 42 S. E. 2d 22 (1947); *Thomas* v. *Trustees of Catawba College*, 242 N. C. 504, 87 S. E. 2d 913 (1955); *Carden* v. *Ensminger*, *supra*; *Firebaugh* v. *Traff*, *supra*; *State* v. *Flynn*, *supra*; *Jacobs* v. *Jacobs*, 50 So. 2d 169 (S. Ct. Fla. 1951); *Chandler* v. *Taylor*, 234 Iowa 287, 12 N. W. 2d 590 (1944); *Patterson* v. *Southern Ry.*, *supra*; *Frank* v. *Marquette University*, 209 Wis. 372, 245 N. W. 145 (1932); *Hawley Products Co.* v. *May*, 314 Ill. App. 537, 41 N. E. 2d 769 (2d Dist. 1942); *Haffenberg* v. *Windling*, 271 App. Div. 1057, 69 NYS 2d 546 (4th Dept. 1947); *White* v. *Skelly Oil Co.*, 11 FRD 80 (W. D. Mo. 1950); *Woods* v. *Kornfeld*, 9 FRD 678 (M. D. Pa. 1950); Anno., 58 ALR 1263 and cases cited; 7 Cyclopedia of Federal Procedure 641 and cases cited; *Steverson* v. *W. C. Agee & Co.*, *supra*; *State* v. *Hall*, *supra*; *State* v. *Aronson*, *supra*; *McClatchy Newspapers* v. *Superior Court*, 26 Cal. (2d) 386, 159 P. 2d 944 (1945); *Toth* v. *Bigelow*, *et al.*, *supra*; *Eilen* v. *Tappin's Inc.*, *et al.*, 14 N. J. Super. 162, 81 A. 2d 500 (1951); *Shell Oil Co.* v. *Superior Court of Los Angeles County*, *et al.*, *supra*; *Los Angeles Transit Lines* v. *Superior Court*, 119 Cal. App. 2d 465, 259 P. 2d 1004 (1953). Cf. *Alabama G. S. R. Co.* v. *Taylor*, 129 Ala. 238, 29 So. 673 (1901); *Ex parte Rowell*, 248 Ala. 80, 26 So. 2d 554 (1946). The burden of proving relevancy must be met by factual allegations showing that the papers sought are pertinent, and not merely by argumentative conclusions. *Thomas* v. *Trustees of Catawba College*, *supra*. The rules of discovery do not authorize an unlimited inquiry into a party's records on the chance that some relevant information may be turned up; *Royster* v. *United Life Ins. Co.*, *supra*; *Haffenberg* v. *Windling*, *supra*; 7 Cyclopedia of Federal Procedure 605-606; nor do they require a corporation to produce all its

business records merely because a suit has been filed against it. *June* v. *George C. Peterson Co.*, 7 Fed. Rules Serv. 34, 41 (N. D. Ill. 1942).

Additional protection to parties against whom discovery is sought is afforded by courts deferring consideration of a motion to produce where a decision on a pending issue may make production unnecessary. Thus, where defendant files a motion to dismiss or a motion for summary judgment contemporaneous with plaintiff's motion to produce, consideration of the latter will be postponed until it is decided whether plaintiff has a cause of action. *Frasier* v. *20th Century Fox Film Corp.*, 119 F. Supp. 495, 497 (D. Neb. 1954); *Daves* v. *Hawaiian Dredging Co.*, 114 F. Supp. 643, 648, 649 (D. Hawaii 1953); *Pyle* v. *Pyle*, 81 F. Supp. 207 (W. D. La. 1948); *Columbia Pictures Corp.* v. *Rogers*, 81 F. Supp. 580, 585 (S. D. W. Va. 1949); *Momand* v. *Paramount Pictures Distributing Co.*, 36 F. Supp. 568, 571 (D. Mass. 1941).

In situations where a party can demonstrate that some valuable right may be infringed upon by discovery proceedings, courts exercise even greater care in issuing orders to produce. Thus, where the production of documents may lead to the revelation of trade secrets, a court will refuse to issue an order to produce unless the party seeking it demonstrates that discovery is necessary for a proper determination of the case. *Drake* v. *Herman, supra; Griffin Mfg. Co. Inc.* v. *Gold Dust Corp.*, 245 App. Div. 385, 292 NYS 931 (2d Dept. 1935); *Kaplan* v. *Roux Laboratories, Inc.*, 273 App. Div. 865, 76 NYS 2d 601 (2d Dept. 1948); *Perfect Measuring Tape Co.* v. *Notheis*, 93 Ohio App. 507, 114 N. E. 2d 149 (Ct. App. Lucas Co. 1953); *International Nickel Co.* v. *Ford Motor Co.*, 15 FRD 357 (S. D. N. Y. 1954); *Wagner Mfg. Co.* v. *Cutler-Hammer*, 10 FRD 480, 485 (S. D. Ohio 1950); *Hercules Powder Co.* v. *Rohm & Haas Co.*, 4 FRD 452 (D. Del. 1944); *Lever Bros. Co.* v. *Procter & Gamble Mfg. Co.*, 38 F. Supp. 680 (D. Md. 1941); *Floridin Co.* v. *Attapulgus Clay Co.*, 26 F. Supp. 968, 972 (D. Del. 1939).

Here, petitioner alleged in good faith that the consequences of disclosure sought would be adverse to it and its members. The court could not have been unaware of public hostility to petitioner. Fair play required, at least, that the court be certain that the apprehended injury be an essential consequence of affording the state a fair opportunity to prove its case. Whatever rationale there might be for the disclosure ordered, it is clear that if petitioner's motion to dissolve was heard and sustained either by the trial court, the Supreme Court of Alabama or this Court, no trial on the merits could take place. Thus, the information might never be needed by the state.

3. Petitioner recognizes the fact that this Court cannot tell Alabama what procedure it should adopt for the handling of litigation. We raise these questions here, however, because they go to the essential character and nature of the proceedings below. The court below issued an order which, if obeyed, would have subjected petitioner's members to danger. Certainly, the court must be convinced of some needed state interest which had to be served to take such an order out of the category of caprice. In *Watkins* v. *United States, supra,* at pp. 187 and 200, this Court stated that the Congress lacked authority to expose the private affairs of individuals for the sake of exposure and without justification in terms of a Congressional function. The harmful effect on individuals was likely to be so great that the Congress was admonished to use its power only within the limits essential to its adequate functioning.

"The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when these forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous" (at page 197). And see *Sweezy* v. *New Hampshire, supra.*

The *Watkins* and *Sweezy* cases concern the power of the Congress and state legislature, but as we have said *supra*, their rationale is applicable to the judiciary. For whatever limitations are placed upon the legislative investigatory function to protect individuals must be applicable to the courts which are unquestionably bound by rules of substantive and procedural due process. Applying the same considerations here applied in those cases, it is clear, we submit, that the order of the court below was arbitrary, and that the entire proceedings failed to meet the standards of due process essential to a judicial determination under our system.

Conclusion

While many persons may find petitioner's aims objectionable and deplore the erosion of the parochial concept of the ultimate superiority of the white race, the aims and purposes which petitioner is seeking to accomplish constitute the great promise and the basic aspiration of American society. Certainly mere dislike of petitioner's purposes cannot justify use of state machinery to restrict its lawful activities. Moreover, whatever the bases for the proceedings to restrict petitioner's operations, it is entitled to a fair and impartial hearing in accord with the requirements of due process. Although resting its decision on procedural grounds, the State Supreme Court passed upon and sustained the trial court's interlocutory order to require petitioner to disclose the names and addresses of its members. If petitioner's position is vindicated here, therefore, no good purpose can be served by remanding the cause to the State Supreme Court for reconsideration. Cf. *Williams* v. *Georgia*, 349 U. S. 375.

WHEREFORE, it is respectfully submitted that the cause be reversed on the ground that the decree restraining all of petitioner's activities, the order to disclose the names and

addresses of petitioner's members and the lack of fundamental fairness throughout the proceedings violated petitioner's right and the rights of its members to due process of law as secured by the Fourteenth Amendment to the Constitution of the United States.

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