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.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITIONER'S REPLY BRIEF

ROBERT L. CARTER,
20 West 40th Street,
New York, New York,

THURGOOD MARSHALL,
107 West 43rd Street,
New York, New York,

ARTHUR D. SHORES,
1630 Fourth Avenue, North,
Birmingham, Alabama,
Attorneys for Petitioner.

CHARLES L. BLACK, JR.,
WILLIAM T. COLEMAN, JR.,
FRED D. GRAY,
GEORGE E. C. HAYES,
WILLIAM R. MING, JR.,
JAMES M. NABRIT, JR.,
LOUIS H. POLLAK,
FRANK D. REEVES,
WILLIAM TAYLOR,
of Counsel.

INDEX

Table of Cases

Statutes

Other Authorities

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.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITIONER'S REPLY BRIEF

Petitioner's, and its Members', Right to Free Association

Respondent concedes that corporations enjoy freedom of speech and press. While it does not clearly deny that in some circumstances there may be a constitutional right, founded in free speech and association, to withhold the kind of information the state has tried to exact here, it argues principally that corporations have no constitutional right to *free association* and, at any rate, may not assert constitutional defenses on behalf of their members—these must be set up by the individual himself.

However, if respondent concedes a corporate right to free speech and press it agrees that rights exist which any reasonable appraisal inextricably connects with free association. This has been made clear in the opinions of this Court. "The right of peaceable assembly is a right cognate to those of free speech and free press and is

equally fundamental." *DeJonge* v. *Oregon*, 299 U. S. 353, 364. The three rights, indeed, are "inseparable." *Thomas* v. *Collins*, 323 U. S. 516, 530. As a distinguished scholar has observed, thus the right of assembly is "an independent right similar in status to that of speech and press." Cushman, *Civil Liberties in the United States* (1956), p. 60.

Like the other basic First Amendment freedoms, freedom of assembly is protected by the Fourteenth Amendment against unreasonable impairment by the states. *DeJonge* case, *supra; Whitney* v. *California*, 274 U. S. 357; *Thomas* v. *Collins*, *supra; Hague* v. *Committee for Industrial Organization*, 307 U. S. 496.

This constitutional status of freedom of association was most recently reaffirmed by this Court in *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250:

> "... 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."

It is, of course, not entirely realistic to speak of a corporation's freedom of association. These artificial entities express themselves and associate through officers, agents, and (in the case of membership corporations) members. As a practical matter, to say that only petitioner's members may assert their individual rights to anonymity is to concede a self-nullifying right for then the only ones who could claim the right to non-exposure would be those who already are exposed. But, beyond this obvious realistic consideration, the cases have, when appropriate, permitted one person or entity to assert the rights of another. We have, in our original brief cited and discussed *Pierce* v. *Society of Sisters*, 268 U. S. 510;

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U. S. 123; *Barrows* v. *Jackson*, 346 U. S. 249. We may add, as other decisions which expressly or implicitly recognize the propriety of such assertion: *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94; *Adler* v. *Board of Education*, 342 U. S. 485; *American Communications Association* v. *Douds*, 339 U. S. 382; *United Public Workers* v. *Mitchell*, 330 U. S. 75; see also Comment: "State Control of Political Organizations: First Amendment Checks on Powers of Regulation" 66 Yale L. J. 545, 546-550 (1957).

The Constitutional Right of Anonymity

Aside from the harassing aspect of the requirement of exposure, petitioner submits that it impairs a constitutional right of anonymity that may not be infringed in the absence of an overriding communal interest which the state is constitutionally competent to protect. The right of anonymity is an incident of a civilized society and a necessary adjunct to freedom of association and to full and free expression in a democratic state.

In *Watkins* v. *U. S.*, *supra*, this Court said (354 U. S. at 187):

> "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress."

What is true of individuals, petitioner submits, is true of associations; and what is true of Congress is true of all other agencies of government, Federal and state. Government may not, without justification, pierce the veil of anonymity.

The Place of Anonymity in a Democratic Society

It is important to recognize that there is nothing inherently wrong in desiring to keep one's name from the public. Alabama itself by statute, recognizes the value of

anonymity in some circumstances: Title 7, Code of Alabama (1940), Section 370 expressly confers upon a newspaperman the immunity from being compelled to disclose in any legal proceeding or before a legislative committee the source of any information procured or obtained by him and published in his newspaper.

Anonymity has a long and honorable history and may serve important social objectives. The cause of civilized progress was greatly benefited by the fact that Daniel Defoe could publish anonymously his *Shortest Way with the Dissenters,* and it was correspondingly greatly harmed when Defoe's identity was discovered and he was fined and pilloried for his offense (Minto, *Daniel Defoe* (1909), pp. 38-40).

In this country, even before the founding of our republic, the practice of speaking anonymously on social and political matters was accepted as normal and proper. Benjamin Franklin signed his first pieces for the *New England Courant* as "Silence Dogwood" (Bleyer, *Main Currents in the History of American Journalism* (1927), pp. 56-57). The use of names like "Philanthrop," "Humanus" and "Cato" as signatures on articles on public affairs was widespread (*Id.,* pp. 43-100). In 1775, Thomas Paine used the signature "Humanus" in an article for the *Pennsylvania Journal;* after Rev. William Smith, president of the University of Philadelphia, used the name "Cato" in attacking Paine's *Common Sense,* Paine replied under the name of "Forester" (*Id.,* p. 91). The *New Hampshire and Vermont Journal or Farmers Weekly Museum* regularly published articles in the 1790's written by such persons as "The Lay Preacher," "Peter Pencil," "Simon Spunkey," "Peter Pendulum" and "The Pedlar" (*Id.,* p. 128).

The most famous of all American political writings, *The Federalist,* written by Alexander Hamilton, James Madison and John Jay, was published anonymously. In-

deed, the attribution of several of the essays is still in doubt. As Professor Earle points out (*The Federalist,* Modern Library edition (1937), Introduction, p. ix), during the controversy over the endorsement of the Constitution, "The press of the day was submerged with contributions from anonymous citizens." Among those anonymously opposing ratification was New York's Governor George Clinton, who wrote under the name "Cato." (See the introduction by Paul Leicester Ford to the Henry Holt edition of *The Federalist* (1898), pp. xx-xxi.)

Thus, in the early days of our Republic, persons who were or were to become President of the United States, Chief Justice of the United States, Secretary of the Treasury and Governor of New York did not hesitate to maintain their anonymity in publishing weighty public and political documents.

This practice is still used by public officials. *Foreign Affairs,* the United States' most influential periodical dealing with international policy, has frequently in recent years masked the names of its contributors, carrying leading articles signed simply by single initials, including the famous "X" article, "The Sources of Soviet Conduct," which set forth the Government's policy towards the Soviet Union (*Foreign Affairs,* Vol. 25, Nos. 1 & 4, Vol. 27, No. 2, Vol. 36, No. 1).

The millions of Americans who are members of secret fraternal orders certainly believe firmly in their right to operate anonymously (Schlesinger "Paths to the Present" [1949], p. 44). Professor Schlesinger describes them as playing a "positive and continuing role in society" (*Id.,* p. 48).[1]

---

[1] A vigorous warning against the growing tendency to limit privacy and force all our activities into the glare of government supervision and public inspection is made by Professor Lasswell "The Threat to Privacy," in MacIver, ed., *Conflict of Loyalties* (1952), pp. 121-140.

Anonymity as an Aid to Free Expression

In a number of ways modern society recognizes anonymity as a valuable aid in assuring free expression of opinion. It is standard practice for newspapers to print letters signed with initials or fictitious names. While the editors require that the writer disclose his name to them, they recognize that a freer expression of opinion can be achieved if they do not require public exposure of the writer's identity.

Public opinion researchers similarly accept the fact that some persons will hesitate to express themselves freely and honestly if they think that there is a chance that their names will ultimately be associated with the answers they give. In *Interviewing for NORC* (1945), the National Opinion Research Center, which has conducted surveys for many government agencies, advised its employees (p. 15):

> "A few persons may be reluctant to talk if they feel their names will be taken. You can explain that NORC *never* wants the name of anyone who doesn't want us to have it."

That the loss of anonymity can have a serious effect on free expression of opinion is recognized in the book, *How to Conduct Consumer and Opinion Research*, Blankenship, ed. (1946). The essay on "Measurement of Employees' Attitude and Morale," advises employers to place (pp. 223-4)

> ". . . emphasis on the point that the questionnaires must not be signed, that no one in the company will have access to the answered questionnaires, that there is no means of identifying a particular person's blank. All of the mechanics of distributing the questionnaire forms and the placing of the answered forms in the ballot box are such as to guarantee anonymity to the employee."

In the same book, the essay on "Trends in Public Opinion Research" describes conclusions drawn by the Office of Public Opinion Research from a comparison of questionnaires answered secretly with others answered by persons who were told that their identity would be known (p. 298):

> "Experiments with secret ballots as compared with oral interviews have shown that respondents are not always frank in stating their opinions. An unpopular opinion or one that reflects in any way upon the prestige of the respondent often gets a higher rating in the secret ballot than in oral replies."[2]

In employees' suggestion programs, likewise, it is common practice to set up a system in which the person making the suggestion does not identify himself but receives a numbered receipt from which he may be identified after the suggestion has been considered. In *How To Conduct A Successful Employees' Suggestion System* (p. 9), Ezra S. Taylor rates anonymity as the most important condition for successful suggestion systems.

Underlying all these practices, anonymous polls, letters to the editor and the like, is the well-founded belief that anonymity in the expression of views contributes to the free play of ideas and hence to the ultimate search for truth, the same search for truth that the founding fathers sought to foster by the guarantees of the First Amendment.

Conversely, it is apparent that a society in which citizens are not allowed to engage in political activity free of the watchful eye of the state would be intolerable. As George Orwell has shown in *Nineteen Eighty-Four,* such prying is consistent only with totalitarianism.

---

[2] The original experiments are reported in detail in Cantril, *Gauging Public Opinion* (1944), Chap. V.

Secret Elections in Democracies

Anonymity, secrecy, privacy, however it may be called, thus has a special value in a democratic society. Nowhere is this seen better than in the act that symbolizes the unity of democratic government and its citizens, the election of public officers. It is not too much to say that the degree of freedom that prevails in a country's election is the surest test of the liberty of its citizens. As Mr. Justice Frankfurter pointed out, concurring in *Sweezy* v. *New Hampshire*, 354 U. S. 234, 266 (1957):

> "In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority. It cannot require argument that inquiry would be barred to ascertain whether a citizen had voted for one or the other of the two major parties either in a state or national election. Until recently, no difference would have been entertained in regard to inquiries about a voter's affiliations with one of the various so-called third parties that have had their day, or longer, in our political history. This is so, even though adequate protection of secrecy by way of the Australian ballot did not come into use till 1888."

This right of "political privacy" (354 U. S. at 267) deserves protection whether exercised through major parties, through minor parties as in *Sweezy*, or through organizations with political objectives such as petitioner.

The Absence of Justification for Compulsory Disclosure

Petitioner concedes, of course, that where a paramount societal interest is to be served or where injury to the community is to be avoided, the right of anonymity must yield and disclosure of identity may constitutionally be compelled. But, as this Court held in *Watkins* v. *U. S. supra*, some justification must be shown. There is, the Court said, no "general power to expose where the predominant result

can only be an invasion of the private rights of individuals" (354 U. S. at 200). In the words of Mr. Justice Frankfurter, concurring in *Sweezy* v. *New Hampshire, supra,* 354 U. S. at 266-7, the Court must strike a balance between "the right of a citizen to political privacy, as protected by the Fourteenth Amendment, and the right of the State to self-protection."

Respondents rely heavily on *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, for the proposition that the State of Alabama may properly demand that petitioner disclose the names and addresses of its members. The holding in the *Zimmerman* case, however, is much narrower, and does not encompass the questions of constitutional law presented in the instant case.

In the first place, the *Zimmerman* case dealt with a New York statute as applied to the Buffalo branch of the Ku Klux Klan. This Court recognized the Ku Klux Klan as a "secret, oath-bound association" (at 71-72) and explicitly noted that the class of organizations in the New York statute has "a manifest tendency . . . to make the secrecy surrounding its purposes and membership a cloak for acts and conduct inimical to personal rights and public welfare." (at 75). The opinion also relates "common knowledge" and a Congressional report concerning the Ku Klux Klan's unconstitutional purposes and illegal activities.

Petitioner is clearly not the kind of organization with which this Court concerned itself in the *Zimmerman* case. The constitutional nature of petitioner's aims and activities, set forth and documented at pp. 2-8 of Petitioner's Brief, is well-known throughout the United States and seems a proper subject for judicial notice.

The New York statute was upheld on the following ground:

> " . . . requiring this information to be supplied for the public files will operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required." (at p. 72)

Compliance with the Alabama order to produce, however, will operate rather as an effective and substantial deterrent on the exercise of constitutional rights of free speech and association by petitioner and its members.

Moreover, the *Zimmerman* case involved no such "special circumstances" or "climate of opinion" as exist in Alabama at the present time. (See Petition, pp. 19-25 and Petitioner's Brief, pp. 12-18). Thus, the action of the state of New York in requiring the Buffalo Ku Klux Klan to reveal its members is completely distinguishable from the court order at issue here. The infringements upon constitutional rights of free speech and association raised in the case at bar are directly connected to the reprisals against members indicated by the atmosphere in Alabama—economic pressure, including loss of employment, harassment, intimidation, and threats of violence as well as actual force.

As the state of Alabama has not demonstrated any valid reason for requiring production of petitioner's membership list, petitioner has a right to "protection against arbitrary, unreasonable, and unlawful interference with . . . [its] patrons . . . " *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535-536.

Finally, the *Zimmermann* case has no application in the instant case because the NAACP, unlike the Ku Klux Klan, is a political organization which plays an integral role in the free trade of ideas which is essential to our democratic form of government. As a consequence, the NAACP necessarily has a "right of anonymity" on behalf of its members as discussed in the preceding sections of this brief.

> "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . All ideas having even the slightest social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees, unless they encroach upon the limited area of more important interests."

Roth v. *United States*, 352 U. S. 964, 1 L. ed. 2d (Adv. pp. 1498, 1506-1507); see also *Thornhill* v. *Alabama*, 310 U. S. 88, 101-102 and *Grosjean* v. *American Press Co.*, 297 U. S. 233, 249-250.

No constitutional justification exists in this case. The order requiring that petitioner expose its membership lists, therefore, should be reversed.

Respectfully submitted,

ROBERT L. CARTER,
20 West 40th Street,
New York, New York,

THURGOOD MARSHALL,
107 West 43rd Street,
New York, New York,

ARTHUR D. SHORES,
1630 Fourth Avenue, North,
Birmingham, Alabama,

Attorneys for Petitioner.

CHARLES L. BLACK, JR.,
WILLIAM T. COLEMAN, JR.,
FRED D. GRAY,
GEORGE E. C. HAYES,
WILLIAM R. MING, JR.,
JAMES M. NABRIT, JR.,
LOUIS H. POLLAK,
FRANK D. REEVES,
WILLIAM TAYLOR,
of Counsel.