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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, Chief of Police of the City of Palo Alto, County of Santa Clara, State of California, JIMMIE BONANDER, PAUL DEISINGER, DONALD MARTIN and RICHARD PEARDON, all Police Officers of the City of Palo Alto, County of Santa Clara, State of California,
Petitioners,

vs.

THE STANFORD DAILY, FELICITY A. BARRINGER, FRED MANN, EDWARD H. KOHN, RICHARD LEE GREATHOUSE, ROBERT LITTERMAN, HALL DAILY and STEVEN G. UNGAR,
Respondents.

No. 76-1600

LOUIS P. BERGNA, District Attorney, Santa Clara County, California, and CRAIG BROWN, Deputy District Attorney,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS BERGNA AND BROWN

OPINION BELOW

The opinion of the Court of Appeals reported at 550 F.2d 464, appears as Appendix A to the petitions for writ of certiorari; an opinion of the District Court adopted by the Court of Appeals and reported at 353 F.Supp. 125 appears as Appendix C to the petitions.[1]

JURISDICTION

The Court of Appeals' order denying these petitions for rehearing and rejecting the suggestions for rehearing in banc, appearing as Appendix B to the petitions for writ of certiorari,[2] was filed on March 28, 1977. The petitions for writ of certiorari were timely filed, docketed in this Court on April 26 and May 16, 1977 and granted on October 3, 1977 (28 U.S.C. section 2101(c)). The jurisdiction of this

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[1]Two other opinions of the District Court not adopted by the Court of Appeals and reported at 366 F.Supp. 18 and 64 F.R.D. 680 appear as Appendices D and E to the petitions for writ of certiorari.

[2]The Court of Appeals' holding would, we submit, effectively invalidate California Penal Code section 1524, and would normally have provided basis for appellate jurisdiction under 28 U.S.C. section 1254(2). See Argument IE, *infra*. Appellate jurisdiction is not clear, however, because the District Court and the Court of Appeals ignored requests to consider section 1524 and did not expressly invalidate the statute in their opinions. See *Minnesota v. Alexander* (1977) 430 U.S. 977, Stevens, J., dissenting.

Moreover, failure to give notice to the California Attorney General as required by former sections 2281 and 2284 of Title 28 of the United States Code constitutes a significant defect in the proceedings. Although the Attorney General appeared as amicus curiae in the Court of Appeals and later entered as counsel for the District Attorney, the Chief Law Officer of the State should have had opportunity to participate fully in proceedings which led to section 1524 being effectively invalidated.

Court is conferred by Title 28, United States Code section 1254(1).[3]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The Civil Rights Act of 1871, 42 U.S.C. section 1983, provides in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any

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[3]Initially we note that this action arguably never presented a case or controversy. The Ninth Circuit held, in essence, that the threat of future similar searches of the Daily presented a case or controversy because the threat inhibited newsgathering. App. Pet. 35. The Ninth Circuit, however, did not question the good faith of petitioners and, that being the case, future similar searches cannot occur unless there again transpire events which give rise to probable cause to believe that there is evidence of a felony on the Daily's premises. The implication in the Ninth Circuit's opinion that the defendants admitted an intent to conduct similar searches is perhaps misleading. Plaintiffs' allegation that similar searches would take place was denied in defendants' answers. The portion of the answer of Defendants' Bergna and Brown which is relied on by the Ninth Circuit acknowledges only an intent to continue good faith enforcement of applicable California laws. Thus under *Younger v. Harris*, (1971) 401 U.S. 37, 41-42 there is no case or controversy. See also *Juidice v. Vail* (1977) 430 U.S. 327.

citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or the proper proceeding for redress."

3. Public Law No. 94-559, 90 Stat. 2640 (October 19, 1976), provides in pertinent part:

"In any action or proceeding to enforce a provision of sections . . . 1979 [42 U.S.C. section 1983]. . . . of the Revised Statutes, . . . the Court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorneys' fee as part of the cost."

4. Section 1524 of the Penal Code of the State of California provides in pertinent part:

"A search warrant may be issued upon any of the following grounds:

. . .

"5. When the property or things to be seized consist of any item or constitute any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

"The property or things described in this section may be taken on the warrant from any place, or from *any person* in whose possession it may be." (Emphasis added).

QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals err in holding that a search warrant violated the Fourth

Amendment solely because the supporting affidavit did not establish probable cause to believe that the occupant of the premises to be searched either participated in the crime or would not honor a subpoena duces tecum?

2. Does the Civil Rights Attorney's Fees Awards Act of 1976 attempt to abrogate the absolute immunity from money liability afforded to judges, prosecutors and those who carry out judicial orders and if it does, is such an attempt constitutionally permitted?

STATEMENT OF THE CASE

On May 13, 1971, the Stanford Daily of Stanford, California, a student newspaper, and seven members of the Daily's staff filed a complaint in the United States District Court for the Northern District of California. A 15-35. The complaint, under Title 42, United States Code section 1983, sought declaratory relief, a permanent injunction, and attorneys' fees. A 30-31. As defendants, the complaint named J. Barton Phelps, Judge of the Municipal Court for the Palo Alto-Mountain View Judicial District; Louis P. Bergna, District Attorney of Santa Clara County; Craig Brown, a deputy district attorney; James Zurcher, Chief of Police for the City of Palo Alto; and Palo Alto Police Officers Jimmie Bonander, Paul Deisinger, Donald Martin, and Richard Peardon. A 15-17.

On October 5, 1972, without waiting for depositions previously noticed by defendants, the District Court

issued its memorandum and order purportedly granting summary judgment. Only declaratory relief was granted, the court stating its anticipation "that [the] decision [would] be honored and that an injunction [would be] unnecessary." App. Pet. 36.

At plaintiff's request, the action against Judge Phelps was dismissed on December 15, 1972. A 190.

By memorandum and order of August 10, 1973 (App. D Pet.) the District Court granted attorneys' fees, and by memorandum and order of July 19, 1973 (App. E Pet.) these fees were fixed at $47,500. Judgment was entered July 23, 1974 (App. F Pet.) and notice of appeal was filed August 21, 1974. A 9.

The Court of Appeals filed its opinion on February 2, 1977 (App. A Pet.) adopting the District Court's opinion of October 5, 1972 (App. C Pet.) holding that "law enforcement agencies cannot obtain a warrant to conduct a third party search unless the magistrate has probable cause to believe that a subpoena duces tecum is impractical." App. Pet. 26. The award of fees was sustained but on a different ground than that relied on by the District Court. Petitions for rehearing and suggestions for rehearing in banc were denied and rejected on March 28, 1977. (App. B Pet.) The mandate of the Court of Appeals has been stayed pending consideration by this Court. A. 14.

STATEMENT OF FACTS[4]

On Friday, April 9, 1971, members of the Palo Alto Police Department were called to the Stanford University Hospital to remove a large group of demonstrators. A 34, 170-171, 176-177, 180-181. After several unsuccessful attempts to persuade the demonstrators to leave peacefully, the officers forced their way through the demonstrators' barricade and into the offices of the hospital. A 170-183. While the main police advance was proceeding on the west side of the building, unknown persons armed with chair legs and other weapons attacked nine officers stationed on the east side. A 34, 704, 174-175. One of the nine officers was knocked to the floor and struck repeatedly on the head. A 174. The Daily reported that "several policemen were beaten to the ground by demonstrators armed with clubs," one officer suffering an apparent broken shoulder. A 104. See A 179. All nine officers were injured. A 104, 179. See App. Pet. 11.

No police photographer was located at the east end of the hospital and most news photographers were located at the west end, the site of the main resistance. A 152-153. Officer Peardon, who was one of the assault victims, did see at least one photographer taking photographs of the assaults from a position "directly behind the Palo Alto officers"; and, on Sunday, April 11, photographs appearing in a special edition of the Stanford Daily indicated that

[4]This statement is based upon affidavits supporting and opposing summary judgment and on the affidavit supporting the search warrant.

the Daily's photographer had been in a position where he could have photographed the assaults. A 34-35.

Officer Peardon obtained a copy of the special edition and on Monday April 12, with the assistance of Deputy District Attorney Brown, prepared a search warrant affidavit. A 27, 33-35, 37, 152-154. The affidavit described the assaults, stated that Peardon had seen a person photographing the assaults and described the photographs published in the Daily's special edition. A 33-35.

Though not mentioned in the search warrant affidavit, Brown had specific reasons, later disclosed in an affidavit opposing summary judgment, for recommending a search warrant rather than a subpoena duces tecum. A 149-154. First, almost all felony prosecutions in California are necessarily (see Argument I. B. *infra,* at 19-20) prosecuted by the complaint-information procedure, and under that procedure no subpoena may issue until a defendant has been identified and a prosecution initiated. Calif. Pen. Code §§ 1326-1327. A 153-154. Second, in a 1969 proceeding that arose out of another demonstration, Brown had sought to obtain photographic evidence from the Daily by means of a subpoena duces tecum. A 149-151. Two staff members had given testimony to the effect that evidence sought by the subpoena had been either misplaced or stolen. A 149-151. Brown then examined "contact sheets" produced by the Daily and concluded "that the contact sheets and/or the films from which they had been produced were incomplete and that a number of photographs, ir

[Brown's] opinion those which would have been incriminating, had been deleted."[5] A 150. Third, in policy statements published prior to April 1971, the Daily stated that it felt "no obligation to help in the prosecution of students for crimes related to political activity" and that "negatives which [could] be used to convict protestors [would] be destroyed."[6] A 118, 152-153. For these reasons, Brown was of the opinion that speedy action was required to avoid destruction of crucial[7] evidence and that such action could only be accomplished by means of a search warrant. A 152-154.

When Peardon's affidavit was prepared it was taken before Judge Phelps. A 21-22. Judge Phelps issued a warrant commanding a search of the premises of the Daily for photographs of the April 9 demonstration, negatives of the photographs and any film used in taking the photographs. A 21-22. The defendant officers executed the warrant at approximately 5:50 in the afternoon, searching desk tops, table tops, unlocked drawers,[8] and other relatively open areas,

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[5]Between the time of the 1969 proceeding and the time of the events that are the basis of this case there were numerous civil disorders in Palo Alto and on the Stanford campus. A 152. Photographic evidence of crimes committed during these disorders had usually been available, without court order, from police photographers or news media other than the Daily. A 152.

[6]An affidavit of a staff member filed in support of plaintiffs' motion for summary judgment asserted that the Daily's policy of evidence destruction did not apply to material covered by a subpoena; this qualification of the policy had not been contained anywhere in the published statement. A 84, 117-118.

[7]The police victims were generally not able to identify the persons who assaulted them. A 175, 180.

[8]There were several locked drawers in the Daily's desks and filing cabinets; these were not opened. A 157, 164.

glancing at materials to determine whether there were pictures, films or negatives concealed among them, but not reading in whole or in part any written material. A 155-169. Materials were, as much as possible, returned to the position in which they were found. A 158, 165, 169. Staff members observing the search did not make any claim of confidentiality for any material. A 158, 161, 165, 168-169. The entire search lasted about fifteen minutes.[9] A 158, 162, 165, 169. Of the materials described in the warrant, only the published photographs were found; nothing was seized. A 27, 43, 53. See App. Pet. 13.

SUMMARY OF ARGUMENT

The Ninth Circuit's startling holding would require that every search warrant application meet a new additional requirement of showing that the occupant of the target premises is a suspect, i.e., that probable cause exists to believe that the occupant participated in the crime to which the search relates, or, if that showing is not possible, then that there is probable cause to believe that materials may be destroyed or that a subpoena is otherwise impractical.

Precedent precludes the Ninth Circuit's additions to the Fourth Amendment. The warrant in the case at bar complied with the traditional delineation of probable cause and with all other requirements of

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[9]The length of the search and whether any material was read were disputed but as the district court's ruling was made on plaintiffs' motion for summary judgment presumably these factual disputes were resolved in defendants' favor. See 6 Moore's Federal Practice, 56.27[1].

the Amendment's warrant clause. The settled meaning of the term probable cause is: cause to believe that specified items relating to criminal activity are at a particular location at a particular time. It means that and only that.

The search warrant is a basic investigative tool essential to effective law enforcement, affording effective protections to the individual, and controlled by prior judical review. The subpoena is slower, may result in the destruction of evidence either from sympathy or criminal pressure, may issue on mere suspicion, is not subject to prior judicial review, may result in Fifth Amendment problems and generally is not available unless a criminal proceeding is pending.

Where, as here, the Fourth Amendment's established protections are applied with scrupulous exactitude, there is no abridgement of First Amendment freedoms. The search was brief, narrow and orderly. No materials were read and no confidences were claimed or breached. Nothing was seized.

The effect of such a search on the newsgathering function is minimal and is outweighed by the compelling public interest in fair and effective law enforcement. A newsman is not exempt from a general law simply because the law arguably decreases the amount of information the newsman supplies to the public. Probable cause to believe a search will produce photographs that constitute direct evidence of violent crimes and also identify the criminals is a compelling reason for the issuance of a warrant.

The lower courts' failure to consider California's scheme of laws, which afford wider protections than the federal scheme, violated principles of comity. The lower courts incorrectly stated as a major rationale the lack of a vicarious exclusionary rule when in fact California has such a rule.

2. The award of attorneys' fees violates the absolute immunity granted by this Court to judges and prosecutors. The Civil Rights Attorney's Fees Awards Act of 1976 does not abrogate this immunity and cannot be interpreted to subject local governmental entities to the payment of attorneys' fees in section 1983 actions. Any attempt by Congress to impose such liability on judges, prosecutors, those who carry out judicial orders and/or public entities would exceed the permissible scope of section 5 of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I

THE TRADITIONAL REQUIREMENT THAT SEARCH WARRANTS ISSUE ONLY ON PROBABLE CAUSE TO BELIEVE SEIZABLE ITEMS ARE IN A PARTICULAR PLACE SHOULD NOT BE ENCUMBERED BY AN ADDITIONAL REQUIREMENT OF PROBABLE CAUSE TO BELIEVE THAT THE OCCUPANT PARTICIPATED IN THE CRIME OR WILL NOT HONOR A SUBPOENA DUCES TECUM.

The Ninth Circuit added to the Fourth Amendment's stated requirements, and held that "law enforcement agencies cannot obtain a warrant to conduct a third party search unless the magistrate

has probable cause to believe that a subpoena duces tecum is impractical." App. Pet. 26. A "third party" means, a "nonsuspect" and apparently, under the court's reasoning, every person is presumed to be a nonsuspect unless the warrant application shows probable cause to believe that the person has participated in the crime to which the search relates. Thus, every search warrant application would be required to meet a new additional requirement of showing that the occupant of the target premises is a suspect, i.e., that probable cause exists to believe that the occupant participated in the crime to which the search relates, or, if that showing is not possible, then that there is probable cause to believe that materials may be destroyed or that a subpoena is otherwise impractical.

A. The Third-Party Search Holding Is In Direct Conflict With Precedent.

The Ninth Circuit's third-party holding is a sharp break with history.[10] The term "probable cause" has always been interpreted to mean cause to believe only that "the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched." Comment, 28 Univ.Chi.L.Rev. 664, 687 (1961).[11] Our

[10]Already, the Sixth Circuit has rejected the Ninth Circuit's third-party holding. *United States v. Mfrs. National Bank of Detroit, Livernois-Lyndon Street, Safety Deposit Box No. 127, Detroit, Michigan* (6th Cir. 1976) 536 F.2d 699, 702-703, cert. den. 429 U.S. 1039.

[11]See also *United States v. Ventresca* (1965) 380 U.S. 102; *Amsterdam*, "Perspectives on the Fourth Amendment" 58 Minn. L.Rev. 349, 358 (1974); American Law Institute, "A Model Code of Pre-Arraignment Procedure, section 220.1 (1972).

research has failed to discover a single jurisdiction, state or federal, interpreting "probable cause" as also entailing cause to believe that the occupant either participated in the crime or will not honor a subpoena.[12] The rule has always been that the affidavit "need not identify the person in charge of the premises or name the person in possession or any other person as the offender." *LaFave,* Search and Seizure:

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[12]The Ninth Circuit reasoned: (1) *Owens v. Way* (Ga. Sup. Ct. 1914) 141 Ga. 796, 82 S.E. 132, and *Commodity Mfg. Co. v. Moore* (Supp. 1923) 198 N.Y.S. 45, "indicate that search of a third party even with a warrant will not satisfy the requirements of the Fourth Amendment;" (2) in situations involving nonsuspects, warrants are unnecessary because of the availability of "less drastic means;" (3) as a historical matter the notion of search warrants has involved only those suspected of crime; (4) *Bacon v. United States* (9th Cir. 1971) 449 F.2d 933 "would seem to compel" the holding; and (5) the exclusionary rule is not available to third parties.

None of these reasons has validity: (1) *Owens* refers to an arrest warrant rather than a search warrant (82 S.E. at 133); the language relied on from *Commodity,* while referring to a search warrant, is dictum (198 N.Y.S. at 47); and the property rationale of these cases is no longer applicable (*Warden v. Hayden* (1967) 397 U.S. 294); (2) the subpoena alternative advanced as a "less drastic means" will not achieve the same ends as a warrant; (3) the statement that search warrants have historically been used only against suspects is simply in error; see Argument I.E., *infra;* (4) the *Bacon* case dealt only with statutory rules applicable to arrest warrants for material witnesses; see 449 F.2d at 943; (5) California has a "vicarious exclusionary rule" permitting a defendant to challenge evidence obtained from the search of a third party, including a nonsuspect and, thus deterring improper third party searches (*Kaplan v. Superior Court* (1971) 6 Cal.3d 150, 98 Cal.Rptr. 649).

Even where the exclusionary rule does not apply to third party searches, impropriety in those searches can be easily deterred. A knowing deception of the magistrate or a knowing excess in the execution of a search will subject the offending police officer to an action for return of the property and for damages. Whatever may have been the reluctance in the past to institute such actions, they are nowadays commonplace.

"The Course of True Law . . . Has Not Run . . . Smooth." U.Ill.L.F. 255, 261 (1966). See also, for example, Federal Rules of Criminal Procedure, Rule 41; California Penal Code sections 1528, 1529. *Hanger v. United States* (8th Cir. 1968) 398 F.2d 91.

There is no dispute that Officer Peardon's affidavit established probable cause to believe that items related to criminal activity would be found on the Daily's premises. The crimes were photographed from close range and published photographs showed this photography probably was performed by the Daily's photographer. There is also no dispute that the warrant's description of the Daily's premises and the photographic materials sought were sufficient to meet the particularity requirements of the Fourth Amendment.

The formal requirements of the warrant clause are the primary means for attending to the evil at which the Amendment was aimed, i.e., these protections preclude the general warrant. See *Johnson v. United States* (1948) 333 U.S. 10, 13-14; see also *Davis v. United States* (1946) 328 U.S. 582, 604-605, Frankfurter, J., dissenting. It is ancient learning that compliance with the warrant clause is compliance with the Amendment: "Whatever else may have been the intent of the forefathers in drafting the first clause of the amendment, it would appear that searches conducted pursuant to the warrant provisions of the second clause fulfill the requirements of reasonable-

ness." Comment, 28 Univ. of Chi.L.Rev. 664, 687 (1961).[13]

B. The Ninth Circuit's Holding Would Harm the Public's Interest In Fair and Effective Law Enforcement and Diminish Present Protections to the Individual.

It has always been recognized that once the Fourth Amendment's established requirements have been met, the public right is paramount.

> "This Court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course . . . [T]he officers in this case did what the constitution requires. They obtained a warrant from a judicial officer 'upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the . . . things to be seized.' It is vital that having done so their actions should be sustained under a system of justice responsive both to the needs of individual liberty and to the rights of the community." *United States v. Ventresca* (1965) 380 U.S. 102, 111-112.

The effectiveness of the search warrant depends upon its being promptly obtained and executed: The warrant "is generally issued in situations demanding prompt action." *Fuentes v. Shevin* (1972) 407 U.S. 67, 93 n. 30. Indeed, the Ninth Circuit has itself recognized that "it is . . . necessary that search war-

[13]Though there has been debate about the relationship between the Amendment's two clauses, that debate has dealt with the extent to which the reasonableness clause permits exceptions to the warrant clause. See e.g., *Davis v. United States, supra,* 328 U.S. at 609-610, Frankfurter, J., dissenting.

rants be executed with some promptness in order to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated." *United States v. Nepstead* (9th Cir. 1970) 424 F.2d 269, 271. In contrast, the Ninth Circuit's new rule would necessarily slow the warrant procedure: Additional information would be required for *every search warrant application.* Subpoenas, proposed as a substitute, have always been slow: They entail notice and opportunity to challenge.

The Ninth Circuit's subpoena is not a viable substitute for a warrant for another reason. A warrant is issued *ex parte* "to avoid giving warning to those in control of the place to be searched." *American Law Institute,* A Model Code of Pre-Arraignment Procedure, Note, section 220.1 (1972). A subpoena *is a warning* that the criminal evidence is wanted. The Ninth Circuit assumes that if probable cause to arrest cannot be shown then the person who has control of criminal evidence, after receiving this warning, can generally be trusted to preserve that evidence. This assumption is not sound. First, there will be many instances where, though probable cause to arrest cannot be shown, the apparent non-suspect is in fact the criminal. "The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice." (*Fuentes* at 93 n. 30). Second, regardless of whether the possessor is a criminal he may destroy or dispose of the evidence. In many cases he will have obtained the evidence because he is sympathetic to the criminal;

this sympathy will produce a strong temptation to dispose of the evidence. In this case, for instance, the plaintiffs had a stated public policy of destroying criminal evidence in "political cases." Perhaps more often the person will not give the evidence to the government for fear of criminal reprisal.

Ironically, the Ninth Circuit's rule is also troublesome because, in several respects, the subpoena is less protective of the individual than is the search warrant. Though the Fourth Amendment guards against overbreadth in subpoenas *(Fisher v. United States* (1976) 425 U.S. 391, 401) the probable cause and particularity requirements are much less stringent. For example, probable cause is satisfied by a determination that the investigation is authorized by Congress. *Oklahoma Press Publishing Co. v. Walling* (1946) 327 U.S. 186, 209. An investigation justifying issuance of a grand jury subpoena "may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors." *Branzburg v. Hayes* (1972) 408 U.S. 665, 701-702. The particularity requirements come down to a requirement that the specification of documents be adequate and not excessive; location need not be specified. *Oklahoma Press, supra* at 209. By contrast a warrant issues only when there is probable cause to believe particularly described seizable items are in a particularly described place. *United States v. Miller* (1976) 425 U.S. 435, 446 n. 8.

In addition, the subpoena process omits all the protections inherent in prior judicial review. *Man-*

cusi v. De Forte (1968) 392 U.S. 364, 371. Once a formal proceeding has been started, subpoenas are issued by clerks signed in blank in batches. Persons unsophisticated in the law are likely to produce subpoenaed property without even knowing that any review is available. Where the third party is knowledgeable in the law, compliance with the subpoena may seem politic, thus destroying any claimed expectation of privacy which the depositor might have in the items sought, *Cf. United States v. Miller* (1976) 425 U.S. 436, 455 (Marshall, J., dissenting).

Use of a subpoena where the criminal status of the "third party" is unclear would also raise concerns under the rule that "the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information. . . ." *Andresen v. Maryland* (1976) 427 U.S. 463, 473-474.

Finally, a subpoena is not available to district attorneys in the absence of a pending judicial proceeding.[14] The Ninth Circuit brushed aside Brown's affidavit to the effect that a subpoena duces tecum was impractical as a matter of California law by commenting that the county grand jury, a body authorized to issue subpoenas, had met shortly after the search. This comment fails to recognize that, with exceptions not here pertinent, California law autho-

[14]But see 1974 California Judicial Council Report, 64 fn. 175 noting that Vermont does permit states' attorneys to subpoena.

rizes only one grand jury per county and requires that grand jury to spend a majority of its time on civil matters. Little time is left for criminal matters and criminal investigations as understood in the federal system are practically unknown. Thus, in 1972 only 3.8 percent of California's felony prosecutions were initiated by way of the grand jury. 1974 California Judicial Council Report, 30.

C. Established Fourth Amendment Protections Are Applied With Scrupulous Exactitude in First Amendment Cases and Were So Applied in This Case.

The Ninth Circuit states that, on being asked to issue a search warrant "the magistrate should consider . . . whether First Amendment interests are involved." App. Pet. 28.[15] We agree. But we do not agree that a radical change in the law is necessary to govern newspaper searches.

Established law applies Fourth Amendment protections with a "most scrupulous exactitude" whenever a search touches on First Amendment interests. *Stan-*

[15]While the Ninth Circuit treats the broad third-party holding as dispositive, the court also sets out a second ruling as applicable to searches of newspapers: "A search warrant should be permitted only in the rare circumstance where there is a *clear showing* that (1) important materials will be destroyed or removed from the jurisdiction; *and* (2) a restraining order would be futile." App. Pet. 32-33. Court's own emphasis.

But then, the Ninth Circuit ruled that Brown's information regarding the Daily's policy of evidence destruction could not be considered as a showing of subpoena impracticality because the information had not been contained "within the four corners of the affidavit." The Court went on to say that even had this information been set forth in the affidavit it would have been insufficient. This sets extremely stringent requirements for the showing of subpoena impracticality. See App. Pet. 33 n.16 and pp. 27-28.

ford v. Texas (1965) 379 U.S. 476, 485. This is also the California rule. *Aday v. Superior Court* (1961) 55 Cal.2d 789, 797-98, 13 Cal.Rptr. 415, 420; Witkin, California Evidence 2d, § 123. The particularity requirements of the warrant clause are so applied that "nothing is left to the discretion of the officer executing the warrant." *Marron v. United States* (1927) 275 U.S. 192, 196. Thus, when the policeman executes the warrant he is strictly limited by its terms. Even though there are items in plain view that he might seize were they named in the warrant the First Amendment may prevent such seizure. See *Roaden v. Kentucky* (1973) 413 U.S. 496; *Fixler v. Superior Court* (1974) 38 Cal.App.3d 475, 481, 113 Cal.Rptr. 285, 289. If there is a seizure, the First Amendment may require opportunity for a prompt adversary hearing. *United States v. Thirty-Seven (37) Photographs* (1971) 402 U.S. 363.

The defendants in this case complied with the rule of scrupulous exactitude: the warrant named only photographs tending to depict violent criminal acts. The search was brief and narrow: items were replaced in their positions; no materials were read; no confidentiality was claimed; no evidence worthy of consideration justifies a conclusion that confidences were actually breached. Nothing was seized.

D. When the Application Of Established Protections Is Scrupulously Exact The Effect Of A Search On The Newsgathering Function Is Minimal And Is Outweighed By The Compelling Public Interest In Fair And Effective Law Enforcement.

Although "newsgathering is not without its First Amendment protections" *(Branzburg v. Hayes* (1972) 408 U.S. 665, 707),[16] the First Amendment is not violated by every restriction that might conceivably decrease the amount of information flowing to the public. See *Zemel v. Rusk* (1965) 381 U.S. 1, 16-17. "[O]therwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed." *Branzburg v. Hayes, supra* at 683.

The laws of libel may subject a newsman to money damages for the circulation of knowing or reckless falsehoods damaging to private reputation (see *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280; *Branzburg* at 684-685); the laws of conversion may require a newsman to pay compensation if he televises the entire act of a performer *(Zacchini v. Scripps-Howard Broadcasting Company* (1977) ..... U.S. ..... No. 76-577, 45 L.W. 4954); and a newsman is restricted by the copyright laws as is any other citizen. See *United States v. Bodin,* 375 F. Supp. 1265, 1267 (W.D. Okla. 1974); *Zacchini, supra*

[16]Newsgathering helps to provide the public with information necessary for self-government. See *Pell v. Procunier* (1974) 417 U.S. 817, 835, Powell, J., dissenting.

The provisions for freedom of speech and press may have been intended not so much to protect a newsman's right to express as to protect the voter's right to hear all views on questions of public importance. See A. Meiklejohn, Free Speech And Its Relation to Self-Government 24-25, (1948).

45 L.W. at 4958 n. 13. Press access to prison inmates is, in general, not constitutionally superior to that of the public *(Pell v. Procunier* (1974) 417 U.S. 817; *Saxbe v. Washington Post Co.* (1974) 417 U.S. 843); and, enforcement of the fair trial guarantee for criminal defendants may deny the press information of dramatic public interest. *Shepherd v. Maxwell* (1966) 384 U.S. 333. Newspapers are not constitutionally exempt from the National Labor Relations Act *(Associated Press v. NLRB* (1937) 301 U.S. 103, 132-133), the Sherman Act *(Associated Press v. United States* (1945) 326 U.S. 1), or nondiscriminatory forms of general taxation *(Grosjean v. American Press Co.* (1936) 297 U.S. 233, 250).

That newspapers may also be subjected to the general laws of criminal investigation is illustrated by *Branzburg v. Hayes, supra:* "Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question." *Branzburg v. Hayes, supra,* 408 U.S. at 692. The search warrant in this case was based on probable cause to believe that the "Daily" possessed photographs of persons engaging in the commission of serious, violent felonies. There is no basis for any special First Amendment claim as to this type of evidence.[17]

When a warrant issues only in circumstances as compelling as these; when its scope is as narrow as

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[17]See also *Caldero v. Tribune Publishing Co.* ..... U.S. ..... (1977) 98 Idaho 288, 562 P.2d 791; cert. den. October 31, 1977 [76-1848; 46 L.W. 3288].

this one; and when the search is narrow, brief and orderly, there is no danger that searches pursuant to warrant will significantly affect the flow of news to the public.

E. The Lower Courts' Failure to Consider California's Scheme of Laws Violated Principles of Comity.

The issuance of search warrants directed against premises of nonsuspects has long been authorized by California Penal Code section 1524.[18] Section 1524 was forcefully called to the attention of the two lower courts; but nowhere in the courts' opinions is there a mention of section 1524.

As opposed to this, a key rationale of the opinions is that nonsuspects will not be protected because of the absence of a vicarious exclusionary rule—this is plain error insofar as California is concerned. California has a vicarious exclusionary rule. *Kaplan v. Superior Court* (1971) 6 Cal.3d 150, 98 Cal.Rptr. 649.[19] In addition, the lower federal courts refused to

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[18]The history of section 1524 makes it clear that it is intended to authorize searches of any and all premises on probable cause even though the premises are those of a "third-party nonsuspect." See for example 32 Cal. State Bar Jour. 615, 616 (1957); Calif. Stats. 1899, c. 72, p. 87, section 1; Cailf. Stats. 1957, c. 1884, p. 3289, section 1. Moreover, the California Legislature recently affirmed the use of search warrants for premises of financial institutions—which, of course may be considered as falling under the "nonsuspect" label. See Calif. Gov. Code sections 7470(a)(3), 7475; "California Right To Financial Privacy Act" Calif. Stats. 1976, c. 1320.

[19]In addition to its employment of the vicarious exclusionary rule, California does more than the federal constitution requires through, for example, its prohibition of full field searches on traffic arrests (*People v. Brisendine* (1975) 13 Cal.3d 528, 546, 119 Cal.Rptr. 315, 326; contrast *United States v. Robinson* (1973) 414 U.S. 218 and *Gustafson v. Florida* (1973) 414 U.S.

consider the general unavailability of subpoenas to law enforcement agencies.

The refusal to consider California's laws and the reliance on a rationale inapplicable to California is a clear violation of comity. Comity entails "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." See *Younger v. Harris* (1971) 401 U.S. 37, 44. See also *Stone v. Powell* (1976) 428 U.S. 465, 491 n.31; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 259, Powell, J., concurring.

Because the Ninth Circuit gave no consideration to California's scheme of laws, the state is now faced

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260); its prohibition of routine inventory of impounded autos (*Mozzetti v. Superior Court* (1971) 4 Cal.3d 699, 94 Cal.Rptr. 412; contrast *South Dakota v. Opperman* (1973) 428 U.S. 364), and, perhaps, a more expansive view of the types of circumstances that give rise to a reasonable expectation of privacy. See *Burrows v. Superior Court* (1974) 13 Cal.3d 238, 118 Cal.Rptr. 166; *United States v. Miller* (1976) 425 U.S. 436, 441, Brennan, J., dissenting. See also Falk, "The State Constitution: A More Than 'Adequate' Nonfederal Ground" (1973) 61 Cal.L.Rev. 273, 277 n.16.

California also has a shield statute which at the time this action was brought protected newsmen from compulsory disclosure of sources. California Evidence Code section 1070; Calif. Stats. 1965; ch. 299; section 1070. This statute has since been amended to protect newsmen from compulsory disclosure of unpublished materials including photographs. But California case law indicates that section 1070 would not shield a newsman from "testifying about criminal activity in which they have participated or which they have observed. . . ." *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 218, 124 Cal.Rptr. 427, 446.

with a frankly experimental ruling that would require major adjustments in its administration of the criminal justice system. Lower federal courts should be directed to confine such experiments, we submit, to federal enclaves. *Compare Stone v. Powell, supra; Schneckloth v. Bustamonte, supra; U.S. ex rel. Lawrence v. Woods,* 432 F.2d 1072, 1075-1076 (7th Cir. 1970).

II

THE AWARD OF ATTORNEYS' FEES VIOLATES THE ABSOLUTE IMMUNITY FROM MONETARY PENALTIES GRANTED TO JUDGES, PROSECUTORS AND THOSE WHO CARRY OUT JUDICIAL ORDERS. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 DOES NOT ABROGATE THIS ABSOLUTE IMMUNITY. ANY ATTEMPT TO DO SO BY CONGRESS WOULD EXCEED THE PERMISSIBLE SCOPE OF SECTION FIVE OF THE FOURTEENTH AMENDMENT.

A. Judges' and Prosecutors' Absolute Immunity from Monetary Penalties Precludes the Imposition of Attorneys' Fees.

The Ninth Circuit acknowledged that *Alyeska Pipeline Service Co. v. The Wilderness Society* (1975) 421 U.S. 240 "destroyed the legal foundation for [plaintiffs'] fee award." App. Pet. 4. Nonetheless, the Circuit Court applied the provisions of the Civil Rights Attorney's Fees Awards Act of 1976, Public Law No. 94-559, 90 Stat. 2640 (October 19, 1976) (hereinafter "the Act"), which states, *inter alia:*

> "In any action or proceeding to enforce a provision of sections . . . 1979 [42 U.S.C. § 1983] . . . of the Revised Statutes, . . . the Court, in its discretion, may allow the prevailing party

> other than the United States, a reasonable attorney's fee as part of the cost."

This statute cannot be applied in this case without abrogating the absolute immunity from monetary penalties afforded to judges, prosecutors and those who carry out judicial orders.[20]

There is little doubt that the magistrate who issued the warrant was the prime actor and therefore the responsible party in this lawsuit. But for his act of signing the warrant, the basis for the instant case would never have existed. If the Act is to apply to anyone, it must apply to the magistrate who by his act sanctioned what the Ninth Circuit concluded was an invasion of the plaintiffs' constitutional rights. Consequently, though the magistrate was dismissed as a party at plaintiffs' request, affirming the Ninth Circuit's opinion would acknowledge a decision that attorneys' fees can be awarded against a prosecutor for essentially a judicial act. It would inevitably lead to the imposition of attorneys' fees against a magistrate or any judge named in an injunctive or a declaratory relief action. In order to preserve the independence of the judiciary, the absolute immunity

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[20]In any event, the Act cannot be applied retroactively, since the impact of personal liability for attorneys' fees will have a disastrous impact on the absolute immunity conferred upon judges and prosecutors and significantly affect the police officers who are duty-bound to carry out a judicial order. Retroactive application of the Act would therefore result in manifest injustice. *Bradley v. The School Board of the City of Richmond* (1974) 416 U.S. 696, 717-718. We also submit that retroactive application of the Act would result in a denial of due process, as no notice has been afforded defendants that decisions made years ago can now be the basis for personal financial liability.

shielding judges from the imposition of monetary penalties compels the conclusion that judges cannot be personally liable for the imposition of attorneys' fees. See *Pierson v. Ray* (1967) 386 U.S. 547.

It is likewise evident that the absolute immunity granted by this Court to prosecutors from monetary penalties in *Imbler v. Pachtman* (1976) 424 U.S. 409 should not be destroyed by the imposition of attorneys' fees. In *Imbler,* this Court denied plaintiff's request for $2.7 million in actual and exemplary damages and $15,000 attorneys' fees, concluding that the prosecutor enjoys "the same absolute immunity under section 1983 that the prosecutor enjoys at common law" (424 U.S. at 427), because:

(1) "The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." 424 U.S. at 424-425.

(2) "[I]f the prosecutor could be made to answer in court each time . . . [a defendant] charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." 424 U.S. at 425.

(3) "Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorful claims of constitutional deprivation. Defending these decisions, years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hun-

dreds of indictments and trials." 424 U.S. at 425-426.

(4) "If prosecutors were hampered in exercising their judgment as to the use of . . . [doubtful] witnesses by concern about resulting personal liability, the triers of fact would be denied relevant evidence." 424 U.S. at 426.

(5) "The ultimate fairness of the operation of the system itself could be weakened . . . . by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." 424 U.S. at 427.

Precisely the same principles preclude the award of attorneys' fees in this case. The constant threat of personal financial liability for attorneys' fees is just as inhibiting as the possibility of a damage award. Labeling the financial imposition "award of attorneys' fees" does not alter either the reality or the burden. In each case the prosecutor is subject to substantial pecuniary liability which will detrimentally affect the decision-making process and divert the prosecutor from the duties of enforcing the criminal law. Moreover, imposing personal liability on a prosecutor who secures a search warrant from a magistrate will result in a chilling effect on his diligent search for relevant evidence. No clearer case can be presented than the instant one, where over $47,000 in attorneys' fees has been awarded, though

the case has not gone to trial and no formal discovery has been commenced.[21]

B. The Act Does Not Abrogate the Absolute Immunity Afforded to Judges, Prosecutors, and Those Who Carry Out Judicial Orders.

Significantly, the language of the Act itself does not specifically state that Congress intended to abrogate judicial and/or prosecutorial immunity. In fact, the legislative history of the Act appears to recognize the continued existence of the individual personal immunities. As stated by the Senate Judiciary Committee:

> ". . . defendants . . . are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected *either* directly from the official, in his official capacity, from funds of his agency or under his control, *or* from the State or local government (whether or not the agency or government is a named party)." (Senate Rep. No. 94-1011, 94th Congress, 2d Session 5 (1976)). (Emphasis added.)

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[21]The reasons underlying the damages immunity of *Imbler v. Pachtman, supra,* also support an immunity against declaratory and/or injunctive actions for prosecutors and those who carry out judicial orders, at least when, as here, they participate in the good faith exercise of judicial functions. There is authority for the proposition that judges are immune from any declaratory or injunctive relief. *Atchley v. Greenhill* (S.D. Tex. 1974) 373 F.Supp. 512, 514, *affirmed,* 517 F.2d 692, *cert. denied,* 424 U.S. 915. See also, *Hill v. McClennan* (5th Cir. 1974) 490 F.2d 859; *Mirin v. Justices of Supreme Court of Nevada* (D. Nev. 1976) 415 F.Supp. 1178, 1192. *Contra, United States v. McLeod* (5th Cir. 1974) 385 F.2d 734. As the good faith of Bergna, Brown and the police has never been challenged, and as they were clearly participating in the exercise of a judicial function, no cause of action has been stated.

The fact that the Senate Judiciary attempted to impose the financial burden either on his department or the governmental entity of which the agency is a component, rather than on individual defendants, evidences a realization of their continuing immunity.

C. The Act Cannot Be Interpreted to Subject Local Governmental Entities to the Payment of Attorneys' Fees in Section 1983 Actions.

The above-quoted language from the Report of the Senate Judiciary Committee, it is argued, evidences an intent on the part of the Committee to impose on local public entities the burden of paying attorneys' fees, notwithstanding the fact that the public entities are not parties to the action.[22]

This argument ignores the fact that there is *no* "threshold . . . congressional authorization" (*Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 452) which allows a section 1983 suit to be brought against a local entity. The statute does not attempt to amend the language of section 1983 to provide that municipalities be liable under the Act and thus legislatively overrule this Court's decisions that state and local government entities are not "persons" within the

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[22]Similar, though less direct, language appears in the House Report: "The greater resources available to governments provide an ample basis from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.[14]" Footnote 14 states: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. (*Fitzpatrick v. Bitzer,* ..... U.S. ....., 96 S.Ct. 2666 (June 28, 1976).") Report of the House of Representatives Committee on the Judiciary, *supra,* at 7.

The question of the Act's applicability to a state is presently before this Court in *Hutto v. Finney, et al.,* No. 76-1660. See 46 L.W. 3093, 3621.

meaning of section 1983. *Monroe v. Pape* (1961) 365 U.S. 167; *Moor v. Alameda* (1973) 411 U.S. 693. From this it is clear that even though some Committee members may well have thought to provide for the payment of fees from municipal treasuries, they did not achieve that objective. The language used in the Act as finally passed does not manifest any intent to overrule this Court. Members of Congress are aware of this deficiency. Recently introduced legislation would amend Title 42, United States Code, section 1983, and specifically include units of government within the definition "person." H.R. 4514, introduced March 4, 1977.

Both the trial court and plaintiffs have attempted to avoid this argument by noting that the public entity would pay any fees pursuant to California's indemnity statute. (Govt. Code § 825.)[23] The fact that a state chooses to indemnify its employees does not confer jurisdiction on a federal court. Federal jurisdiction does not rest in the state legislature. A lower federal court cannot do indirectly what this Court has ruled it cannot do directly. As stated by this Court in *Moor v. Alameda, supra,* at 709-710:

> "To save the Act [section 1983], the proposal for municipal liability was given up. It may be that even in 1871 municipalities which were sub-

[23]It is noteworthy that the Ninth Circuit has held that the California Tort Claims Act and its procedural requirements have *no* application to a federal civil rights action. *Willis v. Reddin* (9th Cir. 1969) 418 F.2d 702, 705. It would clearly be inconsistent to hold that one can bring suit in federal court without fulfilling the requirements of the Tort Claims Act and at the same time cite a provision *of that very* act in an attempt to bootstrap an award of attorneys' fees against a public entity.

> ject to suit under state law did not pose in the minds of the legislators the constitutional problems that caused the defeat of the proposal. Yet nevertheless the proposal was rejected *in toto,* and *from this action we cannot infer any congressional intent other than to exclude all municipalities—regardless of whether or not their immunity has been lifted by state law—from the civil liability created in the Act of April 20, 1871, and § 1983.* Thus, § 1983 is unavailable to these petitioners insofar as they seek to sue the County." (Footnotes omitted) (Emphasis added.)
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> See also *Monroe v. Pape, supra,* 365 U.S. 167.

D. Any Congressional Attempt to Abrogate the Absolute Immunity Afforded Judges, Prosecutors and Those Who Carry Out Judicial Orders Would Exceed the Permissible Scope of the Fourteenth Amendment to the United States Constitution.

Section 5 of the Fourteenth Amendment states: "The Congress shall have the power to enforce, *by appropriate legislation,* the provisions of this article." (Emphasis added.)

Defendants submit that any legislation which renders judges, prosecutors and those who carry out judicial orders liable to the personal imposition of attorneys' fees is not "appropriate legislation." This Court's decisions in *Pierson v. Ray* (1967) 386 U.S. 547 and *Imbler v. Pachtman, supra,* 424 U.S. 409, recognize that in order to preserve the independence of the judiciary and the effectiveness of a prosecutor, it is necessary to prohibit any damage action under Section 1983, regardless of the underlying merits. Any other conclusion would render the police power of

the states meaningless, as the leaders of the states' judicial and law enforcement system would be burdened by the constant threat of personal financial liability.

The investigation of crime and the gathering of relevant evidence is the core of the state's police power. When that investigation discloses the probability that evidence will be found in a particular place, a magistrate, in furtherance of the police power, issues a search warrant and orders officers to carry out the search. Subjecting judges, prosecutors and those who carry out judicial orders to the constant threat of monetary liability whenever they perform an official duty subjects the state to an unnecessary and excessive invasion of the police power.[24]

In our federalist system, "there is a sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in a way that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris* (1971) 401 U.S. 37, 44. No state interest requires more protection from undue Congressional interference than a state's law enforcement system. If Section 5 of the Fourteenth Amendment grants Con-

[24]In a similar context, this Court has recognized that the legislative, judicial and executive powers should remain separate and independent. *Myers v. United States* (1926) 272 U.S. 52, 116. Congressional imposition of attorneys' fees on a state's judicial and executive officials unnecessarily jeopardizes this independence.

gress such unbridled and non-reviewable power, a state's right to administer its judicial and criminal justice systems have been greatly eroded, and the existence of federalism will depend solely upon Congressional majority rule.[25]

CONCLUSION

Petitioners respectfully request that the judgment of the Court of Appeals be reversed.

SELBY BROWN, JR.,
County Counsel,
County of Santa Clara
RICHARD K. ABDALAH,
Deputy County Counsel
70 West Hedding Street
San Jose, California 95110
Telephone: (415) 299-2111

EVELLE J. YOUNGER,
Attorney General of the
State of California
JACK R. WINKLER,
Chief Assistant Attorney General,
Criminal Division
EDWARD P. O'BRIEN,
Assistant Attorney General
W. ERIC COLLINS,
Deputy Attorney General
PATRICK G. GOLDEN,
Deputy Attorney General
EUGENE W. KASTER,
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-1289

Attorneys for Petitioners Bergna and Brown

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[25]It would be equally inappropriate for Congress to achieve the same result indirectly by placing the financial burden upon public entities.