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October Term, 1977

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-v-

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Respondents.

LOUIS P. BERGNA, et al.,
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-v-

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING

The American Civil Liberties Union and the American Civil Liberties Union of

Northern California respectfully move, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief amici curiae. Counsel for the respondents has consented to the filing of this brief; counsel for the petitioners have refused consent.

For 58 years, the American Civil Liberties Union has devoted itself exclusively to protecting the fundamental civil rights of the people of the United States. Foremost among those rights, and preservative of all the others, is the right to "freedom of speech, and of the press" guaranteed by the First Amendment. Although it has vigorously argued that the First Amendment protects the interest of individuals in free expression, the ACLU was perhaps the earliest, and strongest, exponent of the view that the core value protected in the First Amendment is the protection of the free flow of information for robust discussion of public affairs.

As the Court may be aware, the ACLU rarely petitions for rehearing, and has never, so far as we can recall, submitted a brief amicus curiae in support of rehearing.

Nevertheless, the facts of this case, and the incomplete consideration of First Amendment interests in the Court's opinion,

compel us to depart from this longstanding practice. Based on the broad experience of ACLU members throughout the country engaged in a wide variety of First Amendment activities, the ACLU has concluded that the decision in Zurcher, and in particular the opinion's failure to address the procedural protections heretofore provided when searches and seizures would predictably abridge First Amendment rights, poses a novel and extraordinarily dangerous threat to the core First Amendment interests the ACLU has worked so hard to protect.

Meeting only ten days after Zurcher was decided, the 80-member National Board of Directors of the ACLU unanimously voted to undertake "an organizational commitment of the highest priority to reverse the rule enunciated by the Supreme Court in Zurcher v. The Stanford Daily."

The issue raised by this case, and by the Court's opinion, is whether procedure, or official forebearance, will safeguard freedom of speech. In order to urge, strongly, that procedures developed over long experience should safeguard the rights of free expression from abridgement by police searches not narrowly tailored, amici

respectfully move for leave to file this brief.

Respectfully submitted,

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June 23, 1978

In The

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Interest of Amici

The interest of amici curiae is set out in the motion preceding this brief.

THE COURT SHOULD GRANT THE PETITION FOR REHEARING TO CONSIDER WHETHER EX PARTE SEARCHES OF PERSONS ENGAGED IN FIRST AMENDMENT ACTIVITIES, AND NOT SUSPECTED OF CRIMINAL ACTIVITIES, ARE CONSTITUTIONAL ABSENT ADDITIONAL PROCEDURAL SAFEGUARDS NECESSARY TO ASSURE SENSITIVITY TO FREEDOM OF EXPRESSION

For more than twenty years, this Court has required governmental actions infringing First Amendment interests to be justified, at minimum, by a compelling governmental interest, and to be narrowly tailored to achieve the subordinating governmental interest in the least restrictive manner. Nixon v. General Services Administration. 433 U.S. 425, ___, 53 L. Ed.2d 867, 906 (1977); Buckley v. Valeo, 424 U.S. 1, 16, 64 (1976). This is so "even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unin-

tended but inevitable result of the government's conduct..." Buckley v. Valeo, 424 U.S. 1, 65 (1976)(emphasis added).

As the groundswell of concern voiced by the press and the public indicates, there is widespread apprehension and dismay that the Zurcher decision appears not to have fully considered the application of these traditional principles of First Amendment jurisprudence.

The opinion in this case, unless clarified, will have extraordinarily dangerous repercussions, and lead to serious infringements on First Amendment rights, that we cannot believe the Court intended. Even granting the premise of the majority opinion --that the press stands in no different position than other persons so far as the First and Fourth Amendments are concerned-- it is vital that the Court grant rehearing to consider and make explicit the application of traditional First Amendment doctrines, affording procedural protections for all those engaged in First Amendment activities whenever government action will predictably constrict the free flow of information to the people. As it stands, the opinion leaves the application of those

procedural protections in grave doubt.

A particularly disturbing, but not extreme or unrepresentative example of the effect the majority opinion will have can perhaps best be seen by considering cases like Bates v. City of Little Rock, 361 U.S. 516 (1960), and Talley v. California, 362 U.S. 60 (1960). In each case, the Court held that a First Amendment interest in freedom from compelled disclosure (of associational ties of NAACP members or the authorship of particular pamphlets) overrode asserted state interests. Under Zurcher, however, that protected anonymity could be irrevocably overcome simply by the ex parte presentation of an affidavit asserting probable cause to believe that the statutes requiring disclosure were being violated. We cannot believe that the Court means to permit such violations of First Amendment rights without adversarial hearings to permit careful judicial consideration of the substantial First Amendment claims at stake; yet that is the clear result under the majority opinion. Contrary to the Court's statement that "if abuse occurs, there will be time enough to deal with it," the rule in Zurcher would deprive those whose First

Amendment interests have been so infringed of either time, or a forum, to prevent an irremediable loss of First Amendment rights.

Even assuming that a showing of probable cause to search necessarily establishes a compelling state interest sufficient to justify indirect and unintended infringement of the rights of free expression (to say nothing of intended infringements), the ex parte warrant procedure sanctioned by Zurcher, at least without additional safeguards, provides no opportunity for a judicial determination that infringement of free expression has been no greater than necessary. Nebraska Press Association v. Stuart, 427 U.S.539, 568 (1976); United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

With all respect, it is impossible to provide that necessary protection by requiring magistrates to take First Amendment interests into account in granting, or designing, warrants. No such "reasonableness" inquiry could have prevented an Alabama magistrate from issuing a warrant that, once executed, would have provided Alabama officials with the entire membership of the NAACP. Nor would it have prevented a prior restraint on the publication of the Pentagon Papers had the United States Attorney in

New York secured a warrant and seized the galley proofs and contents of the files of The New York Times, based on probable cause to believe that potentially relevant statutes had been violated.

Prior to this case, the fact that a particular government action was subject to the limitations of the Fourth Amendment has not been a sufficient response to the very separate implications that such action might have under the First Amendment. A seizure pursuant to a warrant properly issued on probable cause may fully comport with standards of Fourth Amendment reasonableness, yet still constitute a prior restraint (if documents seized are to be published the next day) or an unjustified abridgement of the right of associational privacy (if membership records are seized.)

The Court has faced this problem before, and has been careful not to subsume First Amendment interests under an expanded concept of Fourth Amendment reasonableness. Instead, it has examined searches predictably abridging First Amendment interests under both Amendments, securing both the privacy rights safeguarded by the Fourth Amendment and the very different interests in an unconstricted

flow of information to the people protected by the First.*/ Without any necessity of embarking on the plainly uncongenial task of narrowly defining the category of persons entitled to special First Amendment consideration, the Court has afforded vital procedural safeguards, additional to those required by the Fourth Amendment, whenever needed to protect First Amendment rights.**/

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*/ E.g., Heller v. New York, 413 U.S. 483, 493 n. 11 (1973); A Quantity of Books v. Kansas, 378 U.S. 205, 210 n.2 (1964). See also Nixon v. General Services Administration, 433 U.S. 425, 53 L. Ed.2d 867, 906 (1977).

**/ "[T]he seizure of instruments of a crime, such as a pistol or a knife . . . are to be distinguished from quantities of books and movie films." Roaden v. Kentucky, 413 U.S. 496, 502 (1973). Indeed, the precise contours and meaning of the Press Clause are not a significant issue in this case; the Court has had little difficulty in distinguishing between pistols and books, knives and movies, and no different analytic effort is necessary to distinguish the implements of the system of freedom of expression (reporters' notes, scholarly manuscripts) from narcotics and burglars tools. The focus is not so much on who the party to be searched is as on the part played by the items to be searched and seized in the system of freedom

(footnote cont. on page 12)

Although surely inadvertently, the majority opinion has left an unmistakable impression that an ex parte showing of probable cause and Fourth Amendment "reasonableness" is in all circumstances the only procedural protection necessary to justify search and seizure even where there will be predictable, substantial deterrent effect on the excercise of First Amendment freedoms. That cannot be the law. We urge the Court to grant rehearing, and to reaffirm the applicability of at least the following procedural protections, analogous to those the Court has required in the past where First Amendment interests were jeopardized by searches and seizures:

A. When a search or seizure will predictably have a substantial effect on First Amendment interests -- for example, when a substantial number of copies of a particular publication are to be seized, or when law enforcement personnel intend to search for and seize

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(footnote cont. from page 11)

of expression. A search for a film in a theater, or a newsman's notes in the offices of the Chicago Tribune, should both be subject to additional First Amendment safeguards; a search for a particular gun in a theater or a newsroom should not be.

information which they should reasonably expect will be disseminated to the public in the near future, so that its seizure would substantially and directly impede the flow of information to the public -- then the First Amendment requires

1. A prior opportunity to contest the abridgment of speech. Carrol v. Commissioners of Princess Anne, 393 U.S. 175, 180-84 (1968); Marcus v. Search Warrant, 376 U.S. 717 (1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1964).

2. An especially particularized description of the items to be seized. A Quantity of Books v. Kansas, supra.

3. An opportunity promptly to copy the seized material. Heller v. New York, 413 U.S. 483, 492-93 (1973).

B. When a search or seizure will predictably have an irremediable effect on First Amendment interests -- when a police intend to seize membership lists of political parties, or civil rights or other analogous organizations--then the First Amendment requires a prior opportunity to contest that abridgment of the right of Free Association. See NAACP v. Alabama, 357 U.S. 449 (1958); Carrol v. Commissioners of Princess Anne, supra;

compare Maness v. Meyers, 419 U.S. 449 (1975) (special procedure afforded to prevent irremediable loss of Fifth Amendment privilege.)

C. When a search or seizure will not have such predictably gross effect, but when interference with First Amendment activities is still likely -- when, for example, the things to be searched for or seized are the "tools" of those engaged in First Amendment activities such as reporters' notes, a newspaper's files, journalists' tapes -- then more normal protections may suffice. The First Amendment requires:

1. An especially particularized description of the items to be seized. A Quantity of Books v. Kansas, supra.

2. A rule requiring officers executing a warrant to permit the party to be searched to provide the enumerated items voluntarily, permitting a search only if such cooperation is not forthcoming. (This would "narrowly tailor" the intrusion on First Amendment rights to the precise governmental need).

3. A rule prohibiting officers executing a warrant from seizing, or reading, or using as evidence First Amend-

ment items (books, notes, tapes) that have not been described in the warrant. (An additional warrant could be sought for such items, if necessary.) Compare United States v. Ramsey, 431 U.S. 606, 623 (1977) (regulations permitting search for contraband, but forbidding postal officials from reading letter mail without a warrant).

These standards are capable of precise application. They do not require definition of "press entities", and do not place the press in a "preferred" position. They do -- as the Constitution does -- afford greater protection to First Amendment rights than to activities of common criminal enterprise. Although the Fourth Amendment standard of reasonableness must be assessed by a magistrate, and perhaps by a reviewing court, in every case, the First Amendment requires a more certain application of procedural safeguards to give the interests of free expression "breathing space to survive". NAACP v. Button, 371 U.S. 415, 433 (1963).

CONCLUSION

The Petition for Rehearing should be granted, the opinion vacated, and the case set down for reargument to consider whether, absent necessary First Amendment procedural sageguards, the search of The Stanford Daily offices violated the First and Fourth Amendments to the Constitution.

Respectfully submitted,

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