In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

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.

REPLY TO BRIEF IN OPPOSITION
(Rule 24(4), U.S. Sup. Ct. Rules)

ARGUMENT

THE NINTH CIRCUIT DID NOT LIMIT ITS THIRD-PARTY SEARCH HOLDING TO SEARCHES OF NEWSPAPERS

Plaintiffs, in their brief in opposition, contend for the first time that we have assigned too much breadth to the Ninth Circuit's third-party search warrant holding. Plaintiffs argue that our interpretation of

the Ninth Circuit's holding "would have amazed the district court below, which expressly refused in *this very case* to extend its ruling beyond the immediate context of a newspaper office search."[1] Brief in Opposition p. 10. This is an argument "first raised in the brief in opposition" and therefore we respond. Rule 24(4) U.S. Sup. Ct. Rules. It is an argument never stated to the Ninth Circuit. In fact, the argument reflects a position directly contrary to the position taken by the plaintiffs in their Ninth Circuit brief. There plaintiffs stated:

> "The district court found it unnecessary to rely on [journalist's affidavits alleging a chilling effect]. *It granted appellees' [plaintiffs'] motion for summary judgment on a ground which did not depend upon whether the parties searched were engaged in news gathering and news dissemination.*" Appellees' brief p. 3. (Emphasis added).

The district court quotation now seized upon by the plaintiffs (Brief in Opposition pp. 10-11 n.2) is from an attorney's fee opinion rendered by that court. That opinion was rendered before the case was argued in the Ninth Circuit. It was not adopted by the Ninth

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[1]Plaintiffs sought a post-judgment injunction against defendant Bergna to prevent a third-party search of Stanford Medical Center. At the hearing, the motion was denied when defendants agreed not to conduct a third-party search of the Stanford Daily. Plaintiffs argue this means the District Court was narrowly restricting its holding to newspapers. But this ruling was made because the medical center search was "not the subject of the instant action" and was without prejudice to a later assertion of the Medical Center's claim in another action (CT III, 748).

Circuit and in no way qualifies it. Thus even though we were to assume for the sake of argument that the district court has had second thoughts regarding its sweeping holding, the Ninth Circuit, encouraged by the plaintiffs, has not. And it is the Ninth Circuit's opinion, now law in nine Western States, which we seek to review in this petition for writ of certiorari.

The Ninth Circuit's search warrant holding is not confined to newspapers. That is clear from this language:

> ". . . [t]he following rule [is compelled]: *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. Any evidence that a subpoena is impractical must be presented in a sworn affidavit if the magistrate is to rely on it.*"[2] Petition Appendix, p. 26. Emphasis added.

State and lower federal courts in nine Western states, faced with this language, have little option but to assign it its obvious meaning. In so doing those courts would necessarily "work a drastic change in the traditional, nationwide practice of issuing search

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[2]As though to emphasize the breadth of its major holding, the Ninth Circuit also rendered this subsidiary holding:

> "Because a search presents an overwhelming threat to the press' ability to gather and disseminate the news, and because 'less drastic means' exist to obtain the same information, third-party searches of newspaper offices are impermissible in all but a very few situations. 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) restraining order would be futile." Court's own emphasis. Appendix pp. 32-33.

warrants on probable cause to believe that seizable items are in a particular place." Petition, p. 8.

Dated, San Francisco, California,
September 6, 1977.

Respectfully submitted,

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