IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 609.

RALPH D. ABERNATHY, et al.,
Petitioners,

v.

L. B. SULLIVAN,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Alabama.

BRIEF FOR RESPONDENT IN OPPOSITION.

ROBERT E. STEINER, III,
SAM RICE BAKER,
M. ROLAND NACHMAN, JR.,
Counsel for Respondent.

STEINER, CRUM & BAKER,
1109-25 First National Bank Building,
Montgomery 1, Alabama,
CALVIN WHITESELL,
Montgomery, Alabama,
Of Counsel

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

CITATIONS.

Cases:

Constitutional Provisions and Statutes:

Miscellaneous:

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 609.

RALPH D. ABERNATHY, et al.,
Petitioners,

v.

L. B. SULLIVAN,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Alabama.

BRIEF FOR RESPONDENT IN OPPOSITION.[1]

OPINIONS BELOW.

The opinion of the Supreme Court of Alabama of August 30, 1962 (App. B of Petition, pp. 31-72) is reported in 144 So. 2d 25.

JURISDICTION.

Petitioners have sought to invoke this Court's jurisdiction under 28 U. S. C., § 1257 (3).

[1] To conserve the time of this Court the brief in opposition filed by this respondent in No. 606, New York Times Company v. Sullivan, will be referred to throughout this brief when the same issues have been covered by respondent in No. 606.

QUESTIONS PRESENTED.

1. Will this Court exercise its certiorari jurisdiction to review a state jury verdict in a private common law libel action, embodied in a final state judgment and affirmed by a state's highest appellate court, when alleged federal questions asserted in this Court were not timely raised below in accordance with state procedure, and when there is nothing in the record to support the allegations of the petition?

2. Is there a constitutionally guaranteed absolute privilege to defame an elected city official, under guise of criticism, in a paid newspaper advertisement so that participants in the publication of this defamation are immune from private common law libel judgment in a state court in circumstances where, because of the admitted falsity of the publication, the participants are unable to plead truth, privilege or retraction (to show good faith and eliminate punitive damages)?

3. Are libelous utterances in a paid newspaper advertisement within the area of constitutionally protected speech and press?

4. When persons whose names appear on a defamatory newspaper advertisement as "warm endorsers" of the advertisement do not deny participation in its publication in response to a demand for retraction which charges publication, and ratify by silence, and when there is other evidence of authority for use of their names on the advertisement, will this Court re-examine a state jury verdict of liability in a private common law libel action, embodied in a final judgment affirmed by the highest state appellate court on a record which a Federal Court of Appeals has found to contain state questions of "substance" which could "go either way", on a petition for certiorari which asserts that the same record is totally devoid of evidence

of petitioners' participation in the publication of this defamatory advertisement?

5. When an admittedly false newspaper advertisement charges that city police massively engaged in rampant, vicious, terroristic and criminal actions in deprivation of the rights of others, is a state court holding in a private common law libel action that such an utterance is libelous as a matter of state law—leaving to the jury the questions of publication, identification with the police commissioner, and damages—an infringement of constitutional rights of a participant in the publication of the libel so as to present any federal question for review on certiorari in this Court?

6. When a paid newspaper advertisement published in circumstances described in Questions 2 and 4 contains admittedly false charges described in Question 5 about police action in a named city, may this Court consistently with its decisions and the 7th Amendment review on certiorari a state jury finding that the publication is "of and concerning" the city police commissioner whose name does not appear in the publication, and an award of general and punitive damages to him, when this state jury verdict embodied in a final state judgment has been approved by the state's highest appellate court?

7. May this Court consistently with its decisions and the 7th Amendment re-examine facts tried by a state jury when those findings have been embodied in a final state judgment affirmed by the highest state appellate court, and when review is sought on assertions that the verdict is wrong and the general and punitive libel damages merely excessive?

STATUTES INVOLVED.

Statutes referred to in this brief are contained in an appendix.

STATEMENT.

Petitioners, whose names appeared in a paid advertisement in the New York Times of March 29, 1960 (described in No. 606) as "warm endorsers" of the material contained in the advertisement, were joined as co-defendants in a common law libel action against The New York Times. The nature of the ad; its falsity; its reference to respondent; the circumstances of its composition, publication and distribution; and other relevant facts of record are fully discussed in respondent's brief in No. 606. As observed there, these petitioners, two residents of Montgomery, and all residents of Alabama, introduced no testimony whatever to attempt to substantiate in any manner the truth of the defamatory material in the advertisement. Nor did they plead specially truth, or privilege.

The jury returned a joint verdict against The New York Times and petitioners in accordance with Alabama procedure,[2] for Five Hundred Thousand Dollars, and the trial court entered a judgment thereon.

In the case which was tried below, as distinguished from the case which petitioners attempt to bring in this Court, the only alleged defect of due process which petitioners asserted at the trial was a contention that there was an entire absence of evidence connecting them with the publication of the advertisement.

Petitioners filed motions for new trial but allowed them to lapse (R. 2069; 2081; 2093; 2105). Petitioners' assertion that there was a "general understanding" (Petition, pp. 14 and 21) which should have prevented this lapse and which was violated by the trial court and presumably by respondent's attorneys is absolutely contrary to fact. The

---

[2] Such a joint verdict against joint tort-feasors is required by Alabama procedure. *Bell v. Riley Bus Lines*, 257 Ala. 120, 57 So. 2d 612. It is, of course, collectible only once.

record is barren of even a hint of such an understanding. The record shows that petitioners' then attorneys (none of whom have appeared in this Court) made no attempt to continue the motion within each thirty day period as required by Alabama statutory and case law. The Times' attorneys obviously were unaware of such an "understanding" since they continued The Times' motion from January 14, 1961 to February 10, 1961 (R. 2057-A) and from February 10, 1961 to March 3, 1961 (R. 2057-D), when the motion was heard. Moreover, as appears from Appendix B of this brief, none of the assignments of error in the Supreme Court of Alabama relating to their motion for new trial even mentioned that there was any "understanding". Clearly there was not. And clearly the motion lapsed.[3]

The court below affirmed the judgment as to all defendants.

At the trial petitioners denied any connection with the publication of the advertisement.

Respondent showed at the trial that the names of the petitioners were on the advertisement. They did not reply to respondent's demand for retraction, and their silence in the face of the demand's inculpatory charges that each published the libel under circumstances normally calling for a reply, was evidence from which a jury could find that they had admitted the statements contained in the demand, namely, that they had published the material in the ad. Their failure to deny publication—not their failure to retract—is the basis of the admission.

Moreover, petitioners' silence, and their failure in any manner to disavow the advertisement, constituted a ratification.

---

[3] Title 13, § 119, Code of Alabama, 1940 (App. A, p. 23); *Mount Vernon Woodbury Mills v. Judges,* 200 Ala. 168, 75 So. 916; *Ex parte Margart,* 207 Ala. 604, 93 So. 505; *Southern Ry. Co. v. Blackwell,* 211 Ala. 216, 100 So. 215.

In addition, a letter from A. Philip Randolph (R. 1706) went to the jury without objection from petitioners as part of The Times' answer to an interrogatory asking for authorization from the signers of the advertisement.[4]

A witness for The Times, Aaronson, testified without objection from petitioners, that the Randolph letter was a "written communication confirming the fact that the persons whose names were given here had authorized it" (R. 1864), and that such a letter was "our usual authorization" (R. 1865). Murray, the author of the ad, a witness for petitioners, testified that the executive director of the committee which inserted the ad, one Bayard Rustin, had stated that the southern ministers, including petitioners, did not have to be contacted or consulted since they were all members of the Southern Christian Leadership Conference, and supported the work of the committee (R. 1937).

While not in this record, the report of **Abernathy v. Patterson**, 295 F. 2d 452 (5th Cir.), cert. denied 368 U. S. 986 shows that the complaint of these petitioners in that case verified by oath of Petitioner Abernathy strongly underlines the correctness of the jury verdict.[5]

---

[4] This letter stated:

"This will certify that the names included on the enclosed list are all signed members of the Committee to Defend Martin Luther King and The Struggle for Freedom in the South. Please be assured that they have all given me permission to use their names in furthering the work of our Committee."

[5] The painstaking analysis of the Court of Appeals revealed:

1. "(The complaint) alleges that on or about March 29, 1960, 'supporters of the plaintiffs and the movement for equality which they lead' inserted in The New York Times a paid advertisement . . ." (295 F. 2d at 453).

2. The advertisement "purports to be signed by twenty ministers including the four plaintiffs" (295 F. 2d at 454).

3. "The complaint then alleges: 'The defendants . . . conspired and planned . . . to deter and prohibit the plaintiffs

The foregoing states the facts relating to this case.

The following matters, stated by petitioners to be in this case, are not.

A. **Matters outside the record which petitioners did not raise in the trial court, but attempted to raise for the first time in the Supreme Court of Alabama.**

1. An alleged racially segregated court room. There is nothing in the record to support this. It was not raised in the trial court.

2. An alleged "atmosphere of racial bias, passion and hostile community pressures" (Petition, p. 2). This was not raised in the trial court. There was no motion for change of venue, continuance, or for mistrial, though three lawyers represented the petitioners and five represented

---

and their supporters as set forth above, from utilizing their constitutional rights and in particular their right to access to a free press, by instituting fraudulent actions in libel against the plaintiffs . . .'" (295 F. 2d at 454).

4. "Irreparable damage is alleged, as follows: '. . . (b) . . . the plaintiffs herein . . . will be deterred from using the media of a free press and all other rights guaranteed under the 1st Amendment . . .'" (295 F. 2d at 454).

5. "The relief prayed for is as follows: '. . . (c) . . . Restraining each of the defendants . . . from engaging in the aforesaid conspiracy designed to deter and prohibit the plaintiffs from exercising rights guaranteed by the 1st and 14th Amendments with respect to freedom of speech, press . . .'" (295 F. 2d at 455).

6. "As has been noted (on page 454), the plaintiffs' claim of irreparable injury and loss is based (1) upon the claim that 'the plaintiffs and the Negro citizens of the State of Alabama will be deterred from using the media of a free press . . .'" (295 F. 2d at 456).

7. "Libelous utterances or publications are not within the area of constitutionally protected speech and press. The plaintiffs' claim that they will be deterred from using the media of a free press must therefore be predicted upon their claims of denial of a fair and impartial trial of the libel actions and the absence of a plain, adequate and complete remedy at law" (295 F. 2d at 456-457).

The New York Times at the trial (R. 1683). Their silence in this regard speaks eloquently for the fair and impartial manner in which the trial judge conducted the trial. There is nothing in the record to support this allegation.

3. Alleged improper newspaper and television coverage at the trial. This was not raised in the trial court, nor were there motions for mistrial, change of venue, or continuance. There is nothing in the record to support the allegations.

4. Alleged intentional and systematic exclusion of Negroes from the jury. This was not raised in the trial court and there is nothing in the record to support the allegation.

5. Alleged unqualified trial judge—illegally elected and illegally a member of the county jury commission. This matter was not raised in the trial court. There was no motion seeking disqualification of the trial judge. There is nothing in the record to support the allegations.

6. Alleged improper closing argument of one of the attorneys for respondent. There is nothing in the trial record about this. No objection to any argument of any attorney is in the record. There was no motion for mistrial.

The record references contained in petitioners' brief on some of these points concern testimony offered by The Times in support of its motion for new trial, after petitioners' motion had lapsed. As the court below held, the trial court correctly excluded such evidence under the well-settled Alabama rule that only when newly discovered evidence is the basis for a motion for new trial is the trial court permitted to extend the hearing to matters not contained in the record of the trial.[6] Apparently, even

[6] 144 So. 2d 25 at 63 (App. to Petition, p. 57) citing *Thomason v. Silvey*, 123 Ala. 694, 26 So. 644; and *Alabama Gas Company v. Jones*, 244 Ala. 413, 13 So. 2d 873.

The Times realizes that the Alabama courts ruled correctly. Its petition in No. 606 does not ask this Court to consider matters outside the record which were not raised in the trial below.

B. **Matters outside the record which petitioners did not seek to raise in the trial court or in the Supreme Court of Alabama.**

1. Petitioners object to transcript reference to its attorneys as "Lawyer." This matter was not raised in either court below. The transcript was obviously prepared by the court reporter after the trial was over. It was prepared at the instance of The New York Times; filed by The Times with the clerk of the trial court; and "joined in" by these petitioners (R. 2108). Under Alabama procedure, these petitioners had an opportunity to make any objection to the transcript which they desired, and to bring the matter to the attention of the trial court for ruling.[7] Moreover, the transcript, noting appearances, refers to these, and all other attorneys, as "Esq." (R. 1683).

2. Petitioners object to an alleged statement by the trial judge regarding "white man's justice", said to have been made by him three months after this trial concluded. The matter was not raised in either court below. There was no motion to disqualify the judge.

But this record **does** reveal that this judge stated to the jury in his oral charge (R. 1947-1948):

> "Now, one other thing I would like to say although I think it is hardly necessary—one of the defendants in this case is a corporate defendant and some of the others belong to various races and in your deliberation in arriving at your verdict, all of these defendants

[7] Title 7, § 827 (1) and § 827 (1a), Alabama Code, Appendix A, pp. 21-22.

whether they be corporate or individuals or whether they belong to this race or that doesn't have a thing on earth to do with this case but let the evidence and the law be the two pole stars that will guide you and try to do justice in fairness to all of these parties here. They have no place on earth to go to settle this dispute except to come before a Court of our country and lay the matter before a jury of twelve men in whose selection each party has had the right to participate and out of all the jurors we had here at this term of Court, some fifty jurors, the parties here have selected you because they have confidence in your honesty, your integrity, your judgment and your common sense. Please remember, gentlemen of the jury, that all the parties that stand here stand before you on equal footing and are equal at the Bar of Justice."

3. The allegation that there was a "general understanding" about petitioners' motion for new trial has already been covered. The point was not raised in either court below.

4. The allegation that an all-white jury deprived petitioners of their rights. This allegation was not made in either court below.

5. The pendency of other libel suits is a matter entirely outside this record; and not presented in either court below. The utter desperation involved in this attempt to bring in other libel suits is fully discussed in respondent's Brief in Opposition in No. 606. The argument will not be repeated here.

6. Alleged "deliberate, arbitrary, capricious, and discriminatory misapplications of law" (Petition, p. 12). It is impossible to determine what the reference is. It cannot have been raised in either court below.

C. **Matters raised below but concluded to petitioners' apparent satisfaction at the time.**

This category relates to the pronunciation of the word "Negro". This entirely spurious objection vanished when, whatever the pronunciation had been, the pronouncing attorney was told to "read it just like it is" (R. 1697). That was the end of the matter. No further objection was lodged by counsel for these petitioners, even though respondent's counsel spoke the word on at least a dozen additional occasions.[8] Moreover, there is nothing in the record to show precisely how the word was pronounced.

D. **Matters foreclosed from the statement of facts by virtue of petitioners' improper procedure below.**

When petitioners allowed their motions for new trial to lapse, they were foreclosed from raising questions regarding alleged excessiveness of the verdict or alleged insufficiency of the evidence.[9]

---

[8] R. 1698; 1699; 1710; 1711; 1712; 1751; 1777; and 1778.

[9] *State v. Ferguson,* 269 Ala. 44, 45, 110 So. 2d 280; *Shelley v. Clark,* 267 Ala. 621, 625, 103 So. 2d 743.

ARGUMENT.

I.

This petition should be denied for failure to comply with Rule 23 (4) of the rules of this Court.[10] The case of **Furness & Company v. Yang-Tsze Insurance Association,** 242 U. S. 430, 434, which contains language forming the model for this rule, enjoined counsel "to see that the petition and reply thereto disclosed the real situation."

Quite apart from the duty of attorneys to confine issues and discussions to matters appearing in the record, particularly when seeking review in this Court, it is noteworthy that not one of the attorneys appearing here for these petitioners was their counsel in the trial court and none was present there. These appellate attorneys are, therefore, peculiarly unqualified to comment on matters not in the record.

As respondent's statement reveals, under the heading of "Questions Presented" alone, no less than nine misstatements and excursions from the record are utilized in attempting to describe the trial below. This Court will surely note that no such characterization of trial proceedings appears in the petition of the New York Times in No. 606. Several of its attorneys were personally present at the trial; participated in it; and know how it was conducted. They make no complaints of trial unfairness in their petition.

These petitioners state that "this case cries for review" (Petition, p. 16). This is the second such "cry" which they

[10] "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

have brought here. Their petition in **Abernathy v. Patterson**, 368 U. S. 986, climaxed a parade of these same baseless charges through the entire federal judiciary. The District Court called them "impertinent"; the Court of Appeals upheld that Court's dismissal of the complaint, 295 F. 2d 452; and this Court denied certiorari. Their current petition reveals the same frantic leap from the record.

It is too elemental for argument that this Court will not go outside the record to consider federal questions which were not timely raised in accordance with state procedure. **Stroble v. California**, 343 U. S. 181, 193-194 (charges of inflammatory newspaper accounts and community prejudice); **Michel v. Louisiana**, 350 U. S. 91 (systematic exclusion of Negroes from grand jury panels not raised in time); **Edelman v. California**, 344 U. S. 357, 358-359 (vagueness of vagrancy statute not raised at the trial); **Stembridge v. Georgia**, 343 U. S. 541, 547 (federal rights asserted for first time in state appellate court); **Bailey v. Anderson**, 326 U. S. 203, 206-207 (same holding); **Herndon v. Georgia**, 295 U. S. 441, 443 (trial court rulings not preserved in accordance with state practice); **Hanson v. Denckla**, 357 U. S. 235, 243-244:

> "We need not determine whether Florida was bound to give full faith and credit to the decree of the Delaware Chancellor since the question was not seasonably presented to the Florida court. Radio Station WOW v. Johnson, 326 U. S. 120, 128."

Thus, aside from the question of whether petitioners have an asserted absolute privilege to defame public officials under the guise of criticism—a matter fully discussed in respondent's brief in No. 606, incorporated herein by reference—the only question which petitioners can argue on this record is whether it is "entirely devoid of evidence of any authorization, consent or publication" by petitioners of the libel (Petition, p. 2).

As this Court held in **Garner v. Louisiana**, 368 U. S. 157, 30 U. S. Law Week. 4070, 4071:

> "As in **Thompson v. City of Louisville**, 362 U. S. 199, our inquiry does not turn on a question of sufficiency of evidence to support a conviction, but on whether these convictions rest upon **any evidence** which would support a finding that the petitioners' acts caused a disturbance of the peace." (Emphasis supplied.)

II.

Positive evidence of authority for use of their names on the ad, supplemented by evidence of their conduct and admission, proved the case against petitioners for submission to a jury.

Their names were on the ad; they did not reply to Sullivan's demand for a retraction which expressly charged them with publication, and their silence in the face of the inculpatory charges contained in the demand for retraction, under circumstances normally calling for a reply, was evidence from which a jury could find an admission of the statements contained in the letters demanding retraction. This admission came from their failure to deny publication—not their failure to retract.

Moreover, their silence and their failure in any manner to disavow the ad constituted a ratification.

The Randolph letter, according to The Times' answers to interrogatories, showed authorization. Testimony of Murray and of The Times' witness, Aaronson, has been cited. Clearly such evidence permitted a jury to decide where the truth lay. And, as pointed out, the sworn complaint in **Abernathy v. Patterson**, 295 F. 2d 452 (5th Cir.), cert. denied 368 U. S. 986, strongly corroborated the correctness of this verdict.

The Alabama trial court and Supreme Court held that there was a jury question on the issue of petitioners' liability as participants in the publication. The Court of Appeals in **Parks v. New York Times Company**, 308 F. 2d 474 (5th Cir. 1962), held that the position of this respondent in the state courts had substance, and that on the question of liability of these petitioners the judgment could "go either way" (308 F. 2d at 480-481). This is the classic situation for jury determination.

The Alabama courts and the Federal Court of Appeals were clearly correct. While petitioners cite no legal authority for their extravagant statement that there is no "recognized theory of law under which petitioners can be held liable for the claimed libel" (Petition, p. 22), respondent will nevertheless give this Court authorities supporting a jury finding of their liability.

A. **Silence as admission.**

1. Petitioners' silence was an admission. This failure to deny publication—not their failure to retract—is the basis of the admission. Petitioners seem unable to distinguish between a retraction and a denial of publication. It is as simple as the rationale of admissions—that a litigant will not be heard to say that his extra-judicial statements or conduct inconsistent with his position taken at the trial, is so litle worthy of credence that the trier of facts should not even consider them.[11]

The Legislature of Alabama, too, has given considerable importance to a demand for retraction in libel cases. Title 7, § 914, Code of Alabama (App. C of Brief in No. 606). The plaintiff in a libel suit such as this may not obtain

---

[11] See *Perry v. Johnston*, 59 Ala. 648, 651; *Peck v. Ryan*, 110 Ala. 336, 17 So. 733; *Craft v. Koonce*, 237 Ala. 552, 187 So. 730; *Sloss-Sheffield Co. v. Sharp*, 156 Ala. 284, 47 So. 279; Annotation 70 A. L. R. 2d 1099; Wigmore on *Evidence*, § 1071; Morgan on *Admissions*, included in *Selected Writings on Evidence*, p. 829.

punitive damages unless he seeks retraction from the defendant; and a defendant may eliminate his liability for punitive damages by retracting.

In much less compelling circumstances, **Gould v. Kramer**, 253 Mass. 433, 149 N. E. 142, 144, held that an admission of the truth of a letter charging defendant with authorship of another letter which had defamed the plaintiff could be considered from the silence of the defendant on receiving the written charge. This suit sought damages for false and malicious statements made by the defendant about the plaintiff in a letter to plaintiff's employer. Defendant contended that he had not signed or authorized the libelous matter contained in the letter.

While the principle of silence as an admission has been held not to obtain when the inculpatory statement was made in an unanswered letter, a well-recognized exception to this letter principle occurs where the unanswered letter contains a demand, or where it is part of a mutual correspondence.[12]

2. The absurd argument in petitioners' brief (pp. 26-27) that this rule of admissions—long a part of the law of evidence throughout this country—somehow violates a fancied federal right deserves no answer. It is undoubtedly based upon the inability of petitioners to distinguish between a denial of publication and a retraction. A denial does not involve statement of belief in the underlying subject matter if the person receiving the demand has not in fact published the material. If he has published a defamatory

[12] See Annotations in 8 A. L. R. 1163; 34 A. L. R. 560; 55 A. L. R. 460. Alabama, too, recognizes this exception to the letter rule. See *Denson v. Kirkpatrick Drilling Co.*, 225 Ala. 473, 479-480, 144 So. 86, and *Fidelity & Casualty Co. v. Beeland Co.*, 242 Ala. 591, 7 So. 2d 265. Among the cases cited for this exception to the letter rule in *Beeland* are *Leach & Co. v. Peirson*, 275 U. S. 120, which recognizes an exception to the unanswered letter rule where the letter contains a demand.

statement, he can and should be liable for civil damages in a common law libel action.

These petitioners in response to the demand for retraction were not called upon to restate their views of the subject matter if in fact they had not participated in the publication. All the demand required in order to avoid this well established rule of evidence was a denial of publication. This is the rule of liability about which petitioners here complain. It involves no federal question whatever. It is as plain and simple a question of a state rule of evidence as can be imagined.

B. **Petitioners ratified and acquiesced in the use of their names on the advertisement.**

Closely allied to the doctrine of silence as an admission is the equally well established principle that one may ratify by silence and acquiescence the act of another even though the persons involved are strangers. Alabama authorities and those elsewhere are thoroughly explored in **Parks v. New York Times Company**, 308 F. 2d 474, 480 (5th Cir. 1962).[13]

This Alabama rule applies whether or not there is a pre-existing agency relationship, and thereby accords with the law set out in Professor Warren A. Seavey's notes to Restatement of Agency 2d cited in footnote thirteen.

Obviously, the foregoing matters involve plain questions of state law, and present no occasion for the exercise of certiorari jurisdiction. If there was **any** evidence against

---

[13] These and others are: *Birmingham News Co. v. Birmingham Printing Co.*, 209 Ala. 403, 407, 96 So. 336, 340-341; *Goldfield v. Brewbaker Motors* (Ala. App.), 36 Ala. App. 152, 54 So. 2d 797, cert. denied 256 Ala. 383, 54 So. 2d 800; *Woodmen of the World Ins. Co. v. Bolin*, 243 Ala. 426, 10 So. 2d 296; *Belcher Lumber Co. v. York*, 245 Ala. 286, 17 So. 2d 281; 1 Restatement of Agency 2d, Sec. 94, page 244, comments (a) and (b); 3 Restatement of Agency 2d (App. pages 168 and 174).

petitioners, there is no federal question. Two Alabama Courts and one Federal Court of Appeals have held there was.[14] Apposite is this Court's observation in **Stein v. New York**, 346 U. S. 156, 181:

> "Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. But that does not mean that we give no weight to the decision below, or approach the record de novo or with the latitude of choice open to some state appellate courts, such as the New York Court of Appeals."

This case does not entitle petitioners to ask this Court to sit as a jury and substitute its collective judgment for that of the jury which tried this case.

III.

Respondent is reluctant to dignify by comment the statements in petitioners' brief which vilify respondent and his attorneys for bringing this libel suit. Surely, this court will note the striking fact that nowhere in this lengthy and vituperative document is there the slightest suggestion that these petitioners, or indeed The New York Times, even attempted to introduce any testimony to substantiate the truth of the matters contained in the paid advertisement.

Respondent cares deeply about freedom of press and speech. And he is also concerned that these basic freedoms do not degenerate into a license to lie. As a commentator cited by petitioners has observed: "In the rise

---

[14] It is, of course, elemental that signers of an advertisement—or those who later ratified the use of their names—would be liable for its publication since every individual participant in the publication of a defamatory statement, except a disseminator, is held strictly liable. *Peck v. Tribune Co.*, 214 U. S. 185; *Developments in the Law—Defamation*, 69 Harvard L. Rev. at 912.

of the Nazis to power in Germany, defamation was a major weapon." Riesman, **Democracy and Defamation**, 42 Columbia L. Rev. 727, 728.

As venerable as John Peter Zenger is the imbedded constitutional principle that libelous utterances are not within the area of constitutionally protected speech and press.[15]

CONCLUSION.

For the foregoing reasons, and in line with **Abernathy v. Patterson,** certiorari denied 368 U. S. 986, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

.....
ROBERT E. STEINER, III,

.....
SAM RICE BAKER,

.....
M. ROLAND NACHMAN, JR.,
Counsel for Respondent.

STEINER, CRUM & BAKER,
CALVIN WHITESELL,
Of Counsel.

I, M. Roland Nachman, Jr., of Counsel for Respondents and a member of the bar of this Court, hereby certify that I have mailed a copy of the above and foregoing Brief and

[15] *Roth v. United States*, 354 U. S. 476, 483; *Beauharnais v. Illinois*, 343 U. S. 250, 256; *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-572; *Konigsberg v. State Bar of California*, 366 U. S. 36, 49-50; *Near v. Minnesota*, 283 U. S. 697, 715.

a copy of Respondent's Brief in Opposition in New York Times v. Sullivan, No. 606, air mail, postage prepaid, addressed to I. H. Wachtel, Esq., 1000 Connecticut Avenue, Washington, D. C., Counsel for Petitioners.

This ..... day of December, 1962.

.....

M. Roland Nachman, Jr.,
Of Counsel for Respondent.

APPENDIX.

APPENDIX A.

Title 7, Section 827 (1) of the Code of Alabama:

"BILLS OF EXCEPTION ABOLISHED IN CERTAIN COURTS; TRANSCRIPT OF EVIDENCE.—Bills of exception in the trial of cases at law in the circuit court and courts of like jurisdiction and all other courts of record having a full time court reporter and from which appeals lie directly to the court of appeals or the supreme court of Alabama, in the state of Alabama, are hereby abolished. If a party to a cause tried in such court desires to appeal from a judgment rendered, he shall, within five days after he perfects his appeal give notice to the court reporter, in writing, that he desires to appeal and request the evidence to be transcribed. The court reporter shall then promptly transcribe the evidence, including objections, oral motions, rulings of the court, and the oral charge of the court, certify the same and file it with the clerk within sixty days from the date on which the appeal was taken, or within sixty days from the date of the court's ruling on the motion for a new trial, whichever date is later. He shall also identify and copy all documents offered in evidence in the order in which offered. The evidence so transcribed and certified and filed shall be a part of the record, and assignments of error may be made as though the transcript constituted a bill of exceptions. If the reproduction of documents offered in evidence, such as maps or photographs, be difficult or impracticable, the court reporter shall so certify, and the clerk shall thereupon attach the original, or a photostatic copy thereof to the transcript on appeal, and such original or photostatic copy thereof shall be a part of the transcript on appeal. If bulky or heavy objects be offered in evidence as exhibits which are not capable of being attached to the transcript, the court reporter shall certify that such exhibits are bulky or heavy objects which

are not capable of being attached to the transcript; that he has identified them as part of the transcript on appeal. The court reporter shall include in his certificate a statement that he has notified both parties or their attorneys of record of the filing of the transcript of testimony. (1943, p. 423, § 1, effective Sept. 1, 1943; 1951, p. 1527, § 1 appvd. Sept. 12, 1951; 1956, 1st Ex. Sess., p. 43, § 1, appvd. Feb. 9, 1956.)"

Title 7, Section 827 (1a) of the Code of Alabama:

"EXTENSION OF TIME FOR FILING TRANSCRIPT; OBJECTIONS TO TRANSCRIPT; HEARING AND RULINGS THEREON.—The period of time within which the reporter must file the transcript may be extended by the trial court for cause. Within ten (10) days after the filing with the clerk of the certified transcript by the court reporter, either party may file with the clerk objections to the certified transcript, with his certificate that he has notified the opposing party, or attorney of record, that the same will be called to the attention of the trial court at a specified time and place. If no objections are filed within such ten (10) days the transcript shall be conclusively presumed to be correct. The hearing of objections and the ruling of the court thereon shall be concluded within a period of ninety (90) days from the date of the taking of the appeal, provided that this period may be extended by the trial court for cause. The trial court shall endorse its ruling on the transcript, sign the same, all within said ninety (90) days period, except as hereinbefore provided. Any ruling of the trial court upon such requested hearing, as well as any ruling on objections to a succinct statement, provided for in section 827 (c) of this title, shall be reviewable, with error duly assigned by the dissatisfied party upon the appeal of the cause, and the evidence upon such hearing shall be duly certified by the court reporter. (1951, p. 1528, § 2, appvd. Sept. 12, 1951.)"

Title 13, Section 119 of the Code of Alabama:

"EXECUTION ON JUDGMENT; NEW TRIAL MUST BE ASKED IN THIRTY DAYS.—After the lapse of ten days from the rendition of a judgment or decree, the plaintiff may have execution issued thereon, and after the lapse of thirty days from the date on which a judgment or decree was rendered, the court shall lose all power over it, as completely as if the end of the term had been on that day, unless a motion to set aside the judgment or decree, or grant a new trial has been filed and called to the attention of the court, and an order entered continuing it for hearing to a future day; provided that in any county in which the trial judge did not reside on the date of the trial such motion may be filed in the office of the clerk, or register, of the court of the county having jurisdiction of said cause, within thirty days from the date of the rendition of the judgment or decree, and the court shall lose all power over it sixty days after the date of the rendition of such judgment or decree as completely as if the end of the term had been on that day unless such motion is called to the attention of the court and an order entered continuing it for hearing to a future date. (1915, p. 707; 1939, p. 167.)"

APPENDIX B.

The following are Petitioners' assignments of error in the Supreme Court of Alabama relating to discontinuance of their motion for a new trial:

42. "For that the trial court erred in its refusal to these defendants the right to be heard on their motion for a new trial, and which refusal deprived these defendants of their property without due process of law in contravention of their rights pursuant to the Fourteenth Amendment to the Constitution of the United States (Tr. 2058-2105)."

43. "For that the trial court erred in its refusal to enter an order or ruling as a matter of record with respect to these defendants' motion for a new trial after repeated request of their attorneys of record in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States of America."

119. "For that the trial court erred when it denied these defendants of their rights to be heard on their motion for a new trial on those grounds of said motion numbered 27 stating that there existed an irregularity in the proceedings of the Court by which these defendants were prevented from having a fair trial in that defendants were subjected to the exercise of judicial power before a tribunal which required its very facilities to be segregated on the basis of race and color and that the imposition of judicial power upon defendants in a segregated tribunal denied to defendants their right to due process and equal protection of the law as guaranteed him under the Alabama and Federal Constitutions (Tr. 2063)."

120. "For that the trial court erred when it denied these defendants of their rights to be heard on their motion for a new trial on those grounds of said motion numbered 26, stating that there existed an irregularity in the proceedings

of the Court by which the parties defendant were prevented from having a fair trial in that the Court is a member of the Board of Jury Supervisors of Montgomery, Alabama; and that said Board selected jurors pursuant to Act No. 118 of March 8, 1939, said Act being unconstitutional, said selection of jurors thereunder by the Court being in violation of Article I, Section 11 of Code of 1901 and the Code of Alabama (1940), Title 7, Section 260, in that the Court as a member of the Board by so selecting those persons who are to decide the case decided both the facts and the law (Tr. 2063)."

121. "For that the trial court erred in depriving these defendants of their rights to be heard on thier (sic) motion for a new trial on those grounds of said motion numbered 30 and 31, stating that the record is so devoid of evidentiary support of the allegations alleged in the complaint in that the plaintiff having failed to present any evidence upon which it could rationally be found that this defendant was legally responsible for the publication of the advertisement which is the basis of this suit, the verdit (sic) of the jury and the judgment of the court against the defendant in the sum of $500,000.00 deprived these defendants of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States (Tr. 2064)."

122. "For that the trial court erred in depriving these defendants of their rights to be heard on their motion for a new trial on those grounds of said motion numbered 38 and 39, stating that the verdict of the jury is contrary to the law in the case and the facts in the case (Tr. 2065)."