IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 40.

RALPH D. ABERNATHY et al.,
Petitioners,

v.

L. B. SULLIVAN,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama.

BRIEF FOR RESPONDENT.

ROBERT E. STEINER, III,
SAM RICE BAKER,
M. ROLAND NACHMAN, JR.,
Attorneys 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.

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BRIEF FOR RESPONDENT.[1]

OPINIONS BELOW.

The opinion of the Supreme Court of Alabama (R. 1139) is reported in 273 Ala. 656, 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 filed by this respondent in No. 39, New York Times Company v. Sullivan, will be referred to throughout this brief when the same issues have been covered there.

QUESTIONS PRESENTED.

1. Will this Court 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 and brief?

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 bare assertion 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?

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. 39) 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 as a defamation, and not a political expression; its extensive falsity, not one "minor discrepancy" (Brief pp. 11, 17 and 42);[2] its reference to respondent; the questions of libel *per se* and truth as a limitation on libelous utterances; the circumstances of the ad's composition, publication and distribution; and other relevant facts of record are fully discussed in respondent's brief in No. 39. 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,[3] 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

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[2] Petitioners are entirely inaccurate in their observation that other "alleged inaccuracies in the ad were conceded by respondent Sullivan to refer to matters within the jurisdiction of the State Education Department or other agencies, and to matters occurring long prior to respondent's taking office" (Brief, p. 12).

[3] 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.

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. 984, 999, 1013, 1028). Petitioners' assertion that there was a "general understanding" (Brief, pp. 14-15) 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 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. 968) and from February 10, 1961 to March 3, 1961 (R. 968), when the motion was heard. Moreover, none of the assignments of error in the Supreme Court of Alabama relating to their motion for new trial (R. 1100-1132) even mentioned that there was any "understanding". Clearly there was not. And clearly the motion lapsed.[4]

The court below affirmed the judgment as to all defendants.

At the trial petitioners denied any connection with the publication of the advertisement. But contrary to what petitioners would have this Court believe, their denial was far from "undisputed", as this record and the following summary of it make clear. Certainly the jury was not required as a matter of law to believe petitioners' protestations of innocence.

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[4] Title 13, § 119, Code of Alabama, 1940 (App. A, p. 29); *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.

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.

In addition, a letter from A. Philip Randolph (R. 587) 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.[5]

Though petitioners recite that "undisputed" evidence (Brief, pp. 8 and 46) established that their names were not on the Randolph letter, and called the contrary finding below "distorted", the sworn answers to the interrogatories were in evidence, and Times witness Redding, according to the Times' brief in this Court, "did not recall this difference in the list of names . . ." (Times Brief in No. 39, p. 16).

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. 739), and that such a letter was "our usual authoriza-

[5] 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."

tion" (R. 740). 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. 809).

While not in this record, the report of **Abernathy v. Patterson**, 295 F. 2d 452 (5th Cir.), cert. den. 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.[6]

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[6] 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 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 plain-

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. Had it been, respondent would have strongly controverted the allegation as entirely untrue.[7]

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 The New York Times at the trial (R. 567-568). 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 con-

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tiffs' claim that they will be deterred from using the media of a free press must therefore be predicated 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).

[7] Petitioners tell this Court that court room segregation "has been judicially noted to be a longstanding practice in the state courts of Alabama . . ." (Brief, p. 53). They cite *U. S. ex rel. Seals v. Wiman*, 304 F. 2d 53 (5th Cir. 1962). But that case specifically held that the question of a segregated courthouse, there sought to be raised, "[was] not presented to the State courts on the appeal from the judgment of conviction, on the petition for leave to file coram nobis, or in any other manner. Those questions cannot therefore be considered here" (304 F. 2d at 56).

tinuance. There is nothing in the record to support the allegations. Had there been timely trial motions attacking the propriety of newspaper and television coverage of the trial, respondent would have strongly controverted them.

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. Had the allegation been made, respondent would have strongly controverted it.[8]

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 allegation. Had the charge been made in timely fashion, it would have been strongly controverted.

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. Had such objection or motion been made, respondent would have strongly controverted any suggestion of an improper argument. It is noteworthy that the Times makes no such allegation in this Court.

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

[8] When this question was appropriately raised in a recent case, the method of selecting Montgomery County juries passed constitutional muster in this Court. *Reeves v. Alabama*, 355 U. S. 368, dismissing the writ of certiorari "as improvidently granted."

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.[9] Obviously the Times and these petitioners realize that the trial court ruling was correct. No petitioner challenges the ruling of the courts below here. Unlike the Times, however, these petitioners simply cite this rejected material as evidence anyway, and 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 the court reporter's transcript designation of their attorneys as "Lawyer." This matter was not raised in either court below. The record was obviously transcribed 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. 1031). 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.[10] Moreover, the transcript, noting appearances, refers to these, and all other attorneys, as "Esq." (R. 567-568).

Obviously these designations by the court reporter are his own, and were made after the trial had closed. They do not purport to be, nor are they, quotations of the manner of address used by the attorneys in the case or by the trial judge. A search of the record reveals that only an attorney for the New York Times used this form of

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[9] (R. 1165) citing *Thomason v. Silvey*, 123 Ala. 694, 26 So. 644; and *Alabama Gas Company v. Jones*, 244 Ala. 413, 13 So. 2d 873.

[10] Title 7, § 827 (1a), Alabama Code, Appendix A, p. 27.

address in the proceedings before the trial court without a jury.[11]

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. 819-20):

> "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 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 of the parties that stand here stand before you on equal footing and are all equal at the Bar of Justice."

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[11] "Mr. Embry: . . . I will read Lawyer Gray's examinations" (R. 550).

"Mr. Embry: At this time, your Honor, Lawyer Gray said, 'That's all'" (R. 551).

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. Any such allegation of misconduct on the part of the jury would have been strongly controverted by respondent.

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. 39. The argument will not be repeated here. The baseless and totally unfounded charge that this case is "part of a concerted, calculated program to carry out a policy of punishing, intimidating and silencing all who criticize and seek to change Alabama's notorious political system of enforced segregation" (Brief, p. 29) is simply a figment of the imagination of petitioners and their appellate lawyers. The charge is totally without foundation in the record or in fact. Significantly, none of the numerous attorneys representing the Times and these petitioners at the trial even questioned respondent about such a preposterous matter.

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.

It is not clear from petitioners' brief whether they claim that these matters outside the record (sub-heads "A" and "B") were raised by "steps" said to have been taken "to preserve their constitutional rights" (Brief, p. 14). Petitioners summarize these "steps" as demurrers to the

complaint; objections to the admission of evidence; motions to exclude evidence as insufficient; motions for special jury findings; written requests to charge the jury; and motions for directed verdict in their favor (Brief, p. 14). Obviously, such "steps" could not raise the foregoing points in "A" and "B" under any known rules of practice. It is perfectly plain that the questions were never presented at the trial. And later observations that the questions are "inherent and implicit in the trial transcript" (Brief, p. 59), and "shockingly manifest outside the transcript as well" (Brief, p. 60), reveal clearly that petitioners, too, know these matters were never raised, and are not part of the record before this Court.

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. 579). 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.[12] 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.[13]

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[12] R. 580; 581; 592; 593; 631; and 656.

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

SUMMARY OF ARGUMENT.[14]

I.

When the only defect of procedural due process asserted at the trial was an alleged entire absence of evidence connecting petitioners with the publication of the ad, they cannot go outside the record and seek to present to this Court new matters—none of which were raised in the trial court, and many of which were not asserted in the Supreme Court of Alabama. Included in this category are those arguments in this Court which allege a segregated trial courtroom; a hostile and prejudiced trial atmosphere; improper newspaper and television coverage of the trial; illegal composition of the jury; improper argument of one of the lawyers for respondent; improper court reporter's designation of petitioners' attorneys in the appellate transcript of the record prepared many months **after** the trial was over; improper statements allegedly made by the trial judge three months **after** the trial had ended; pendency of other libel suits by different plaintiffs, against different defendants, regarding different publications, in different communications media, brought in different forums, with different attorneys, and different issues; illegal election of the trial judge.

Had these allegations been made before or during the trial, they would have been strongly controverted. Since these assertions of alleged federal questions were not made in timely fashion, this Court will not go outside the record to consider them. **Stroble v. California,** 343 U. S. 181, 193-194 (charges of inflammatory newspaper accounts and community prejudice); **Michel v. Louisiana,** 350 U. S. 91

[14] Respondent refers this Court to his summary of argument in New York Times Company v. Sullivan, No. 39, where applicable. Respondent has there set out a summary of the constitutional questions relating to the substantive Alabama law of libel as applied in this case. Those arguments will not be repeated in this brief.

(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.

Since petitioners allowed their motions for new trial to lapse, they may not question the size of the verdict against them or the sufficiency of the evidence. **State v. Ferguson**, 269 Ala. 44, 45, 110 So. 2d 280; **Shelley v. Clark**, 267 Ala. 621, 625, 103 So. 2d 743.

Moreover, it is noteworthy that the Times does not argue that the trial proceedings were defective or that they were other than fair and impartial.

II.

The only federal question of due procedure raised at the trial was whether there was **any** evidence connecting petitioners with the publication of the ad. Positive evidence of authority for the use of their names on the ad, supplemented by evidence of their conduct and admissions, proved the case against petitioners for submission to a jury.

Their names were on the ad; and the Randolph letter, according to the Times' answers to interrogatories, showed authorization.

In addition, petitioners did not reply to Sullivan's demand for retraction which expressly charged them with publication. Their silence in the face of the inculpatory charges contained in this demand, under circumstances normally calling for a reply, was evidence from which a jury could find an admission of the statements con-

tained in the letters demanding retraction. This failure to deny publication—not their failure to retract—is the basis of admission. 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 little worthy of credence that the trier of fact should not even consider them. **Parks v. New York Times Company**, 308 F. 2d 424 (5th Cir. 1962); **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.

Closely allied to the doctrine of silence as admission is the equally well-established principle that one may ratify by silence and acquiescense the act of another, even though the persons involved are strangers. This Alabama rule applies whether or not there is a pre-existing agency relationship. **Parks v. New York Times Company**, 308 F. 2d 424 (5th Cir. 1962); **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).

III.

Libelous utterances are not within the area of constitutionally protected speech and press. **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.

ARGUMENT.

I.

This Court Will Not Go Outside the Record to Consider Federal Questions Which Were Not Timely Raised in Accordance With State Procedure.

This brief should be stricken for failure to comply with Rule 40 (5) of the Rules of this Court.[15] In addition to the matters outside the record which were not raised in the trial court, and in some instances not even in the Supreme Court of Alabama, petitioners' brief contains lengthy expositions of cases and other materials relating to racial matters involving peonage, education, voting, housing and zoning, public transportation, parks, libraries, petit and grand jury service, municipal boundaries, and reapportionment. In the aggregate, such material and excursions from the record consume almost forty-five per cent of petitioners' brief.

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.

This Court will surely note that the brief of The New York Times in No. 39 does not support petitioners' characterization of the trial proceedings. Several of its at-

[15] "Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court."

torneys were personally present at the trial; participated in it; and know how it was conducted. They make no complaints of trial unfairness.

This is the second time petitioners have brought their baseless charges here. Their petition in **Abernathy v. Patterson**, 368 U. S. 986, climaxed a parade of these same groundless attacks 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.

It is too elemental for argument that this Court will not go outside the record to consider alleged 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, and thereby to avoid Alabama libel laws—a matter fully discussed in respond-

ent's brief in No. 39, incorporated herein by reference—the only question which petitioners can argue on this record is whether it is "devoid of probative evidence of authorization or publication by any of the petitioners of the alleged libel or of any malice on their part" (Brief, p. 44).

As this Court held in **Garner v. Louisiana,** 368 U. S. 157, 163-164:

> "As in Thompson v. Louisville (citation), 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.

There Was Ample Evidence of Petitioners' Publication for Submission to a Jury.

Positive evidence of authority for use of their names on the ad, supplemented by evidence of their conduct and admissions, 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.

It is impossible to understand petitioners' assertion here that the Court of Appeals reversed the District Court "on other grounds" (Brief, p. 44). This erroneous assertion is simply in direct conflict with the holding of the Court. Moreover, in view of the Court's extensive and exhaustive discussion of silence in the face of the inculpatory charges in the demand for retraction as evidence from which a jury could "infer ratification or adoption" (308 F. 2d at 479), it is inconceivable that petitioners argue here (Brief, p. 45) that **Parks** "is clearly shown by the Opinion to rest on matters not contained in the Record in this case . . ." The very record on the merits in this case was introduced in the District Court in **Parks.**

The Alabama courts and the Federal Court of Appeals were clearly correct. Petitioners, in their lengthy brief, do not even attempt to challenge the legal authorities cited by respondent in his brief in opposition (pp. 15-18) except

to say that they are inapplicable (Brief, pp. 48-49). But they are not, and give solid support to the jury finding of petitioners' 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 little worthy of credence that the trier of facts should not even consider them.[16]

The Legislature of Alabama, too, has given considerable importance to a demand for retraction in libel cases. Title 7, § 914, Code of Alabama (App. A of Brief in No. 39). The plaintiff in a libel suit such as this may not obtain 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. De-

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[16] 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.

fendant 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.[17]

2. The absurd argument in petitioners' brief (pp. 49-52) 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 a "dissociation" of belief in the underlying subject matter. If one has published a defamatory statement, he can and should be liable for civil damages in a common law libel action. If he had nothing to do with the defamatory publication, he certainly knows it, and is in a position to deny promptly. In short, these petitioners could have done exactly what they did at the trial—deny publication in an answer to the letter charging it.

Moreover, petitioners' argument that the retraction statute imposes too great a financial burden upon them is equally frivolous. If these petitioners had wanted a forum as wide as that of the advertisement, they could have written, most inexpensively, a letter to the New York Times for publication and there explained their alleged innocence.

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[17] 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. Pierson*, 275 U. S. 120, which recognizes an exception to the unanswered letter rule where the letter contains a demand.

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).[18]

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 eighteen.

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 petitioners, there is no federal question. Two Alabama Courts and one Federal Court of Appeals have held there

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[18] 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).

was.[19] 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

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[19] 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.[20]

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be dismissed as improvidently granted; in the alternative, respondent respectfully submits that this case should be affirmed.

Respectfully submitted,

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ROBERT E. STEINER, III,

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SAM RICE BAKER,

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

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

I, M. Roland Nachman, Jr., of Counsel for Respondent, and a member of the bar of this Court, hereby certify that I have mailed copies of the foregoing Brief and of Re-

[20] *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.

spondent's Brief in No. 39, The New York Times Company v. Sullivan, air mail, postage prepaid, to I. H. Wachtel, Esquire, Counsel for petitioners, at his office at 1100 17th Street N. W., Washington, D. C. I also certify that I have mailed a copy of the foregoing Brief, air mail, postage prepaid, to Edward S. Greenbaum, Esquire, 285 Madison Avenue, New York, New York, as attorney for American Civil Liberties Union and the New York Civil Liberties Union, as *amici curiae*.

This ..... day of October, 1963.

.....

M. Roland Nachman, Jr.,

Of Counsel for Respondent.

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.)"