The Burger Court Opinion Writing Database

Investment Company Institute v. Camp

401 U.S. 617 (1971)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

February 17, 1971

Re: Nos. 59 - 61 - National Association of Securities Dealers, Inc. v. SEC, et al.

Dear Potter:

I agree to your opinion in this case.

Sincerely,

H. L. B.

Mr. Justice Stewart

cc: Members of the Conference

March 10, 1971

Dear Potter:

In re No. 61 - Investment Institute v. Camp.

Brother Harlan, with all respect, is way off base on the "standing" point.

As we indicated in Data Processing, 397 U.S. at 155, the Hardin case was one where the plaintiff was a competitor and the statute protected them. But the test propounded was not limited to "competition," as indicated by the aesthetic, conservational, recreational, and spiritual interest which we made plain were often included. 397 U.S. at 154. At p.153 we said the question is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute." In No. 61 mutual funds are certainly "regulated" and have standing whether they win or not. They are in the congeries of financial interests having a stake in the outcome of the litigation, and which are affected no matter how the litigation ends. In Barlow the tenant farmers had "interests" which the Secretary was supposed to protect. 397 U. S. at 164.

Whether in Data Processing or in Barlow the complainant would win went to the "legal interest" they had in the outcome, a question relating to the merits. 397 U.S. at 158.

In light of Data Processing and Barlow I think in all frankness that Brother Harlan's questions are frivolous.

W. O. D.

Mr. Justice Stewart

WOD

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN M. HARLAN

March 10, 1971

Re: No. 61 - Investment Co. Institute v. Camp

Dear Potter:

Putting aside the merits for the time being, I regret to say that I am having difficulty with the discussion of standing in your proposed opinion for the Court. The issue appears to me to be one of considerable complexity, requiring a more detailed examination than it presently receives.

The complications stem from the fact that, as all three judges on the Court of Appeals agreed, the pertinent sections of the Glass-Steagall Act, as well as the legislative history, evince no congressional intention to protect any class to which the plaintiffs in No. 61 belong. Thus Judge Bazelon stated: "The Glass-Steagall Act was not intended by Congress to protect mutual funds from competition from banks, so they do not have standing as intended beneficiaries ...." 420 F. 2d, at 96. See also id., at 98-100. Judge Burger, as he then was, and Judge Miller were of the same view: "It is equally clear that giving even the broadest reading of the legislative history embellishing the Act will not support the conclusion that Congress meant to bestow upon Appellees any protection from competitive injury." Id., at 105 (footnote omitted). See also id., at 105-106 n. 7, 108. It appears reasonably plain that the Act was adopted despite its anticompetitive effects, not because of them. The petitioner in No. 61 is unable to point to any legislative history to the contrary. See its Reply Brief at 27-29 and n. 27.

This being the case the discussion of standing by Mr. Justice Black, speaking for the Court in Hardin v. Kentucky Utilities Co., 390 U.S. 1, 5-6 (1968), is directly in point:

"This Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations. Railroad Co. v. Ellerman, 105 U.S. 166 (1882); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Tennessee Power Co. v. TVA, 306 U.S. 118 (1939); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule, at least since the Chicago Junction Case, 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision."

I do not believe that Association of Data Processing Service Organization v. Camp, 397 U.S. 150 (1970), requires the opposite result from the one suggested by this passage from Hardin. Data Processing held that, aside from "case-or-controversy" problems not present here, the crucial question in ruling on a challenge to standing is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S., at 153. That question was resolved in favor of the Data Processors because "§ 4 [of the Bank Service Corporation Act] arguably brings a competitor within the zone of interests protected by it." Id., at 156. Similarly, in the companion case of Barlow v. Collins, 397 U.S. 159, 164 (1970), we held that tenant farmers had standing to challenge a regulation of the Secretary of Agriculture as inconsistent with a certain statute for they were "clearly within the zone of interests protected by the Act." We found, upon a review of the relevant materials, that "[i]mplicit in the statutory provisions and their legislative history is a congressional intent that the Secretary protect the interests of tenant farmers." Ibid.

I note that your opinion does not refer to the "arguably protected" test of Data Processing, which divided the Court in that case. Even on the assumption -- which seems to me highly doubtful -- that ICI's monopolistic interests are "arguably protected," this would not dispose of the matter under Data Processing. As Professor Jaffe has observed with respect to that case,

> "The sense of the holding is ambiguous because it is not clear what is to be considered on 'the merits.' Is it a further inquiry into whether the statute means to protect plaintiff or simply whether the action is ultra vires? In earlier cases (e.g., Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968)) plaintiff was held to have standing but lost on the merits because the action was held valid. If, now, plaintiff gets by the motion to dismiss because 'arguably within the zone of interests to be protected,' does he automatically win if the action is held invalid?" Jaffe, Standing Again, 84 Harv. L. Rev. 633, 634 n. 9 (1971).

It may be that a negative answer to Professor Jaffe's question is to be inferred from the following passage in Data Processing:

> "Whether anything in the Bank Service Corporation Act or the National Bank Act gives petitioners a 'legal interest' that protects them against violations of those Acts, and whether the actions of respondents did in fact violate either of those Acts, are questions which go to the merits and remain to be decided below." 397 U.S., at 158.

This passage seems to indicate that the existence vel non of a "legal interest" is distinct from the issues of standing and reviewability on the one hand and from the legality of the administrative conduct on the other. The only relevant issue which appears to satisfy these conditions is whether the plaintiff's interest is "actually" as well as "arguably" within the zone of interests intended to be protected.

If despite this passage there is no further inquiry into whether a person "arguably" protected is "actually" protected

-- and the proposed opinion engages in no such inquiry -- then we have gone even beyond the position advocated by the dissent in Data Processing. The dissent there would not only have required injury in fact and the absence of an intent to preclude judicial review generally; it would also have investigated "whether Congress nevertheless foreclosed review to the class to which plaintiff belongs." 397 U.S., at 173. In the latter connection, the dissent observed that "[w]here, as in the instant cases, there is no express grant of review, reviewability has ordinarily been inferred from evidence that Congress intended the plaintiff's class to be a beneficiary of the statute under which the plaintiff raises his claim." Id., at 174. While it may be that facts other than an intent to protect plaintiff's class would also give rise to a conclusion of "reviewability" in the dissent's terminology, I would not have thought that evidence of an "arguable" intention to protect was sufficient, particularly if the intention disappeared on closer examination.

In raising these questions, I do not mean to suggest that I have decided ICI lacks standing. It may well be, as Professor Jaffe and all three judges below concluded, albeit for differing reasons, that there is some judicial discretion to hear claims despite the absence of standing in the traditional sense, and that this is an appropriate case for the exercise of such discretion. But this is not what I understand your opinion to hold, and I fear that I cannot agree to its "standing" holding as I presently understand it. (Nor have I yet made a sufficient study of the case to come to rest on the merits.) I of course shall welcome your views on these matters.

Sincerely,

J.M.H.

Mr. Justice Stewart

CC: The Conference

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 61 & 59.—OCTOBER TERM, 1970

Investment Company Institute et al., Petitioners,
61 *v.*
William B. Camp, Comptroller of The Currency, et al.

National Association of Securities Dealers, Inc., Petitioner,
59 *v.*
Securities and Exchange Commission et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

[April —, 1971]

MR. JUSTICE HARLAN, dissenting.

The Court holds that the Investment Company Institute has standing as a competitor to challenge the action of the Comptroller of the Currency because Congress "arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury." The ICI, says the Court, is entitled to prevail because "Congress *did* legislate against the competition that the petitioners challenge." *Ante,* at 3 (emphasis added). I understand the Court to mean by "legislated against the competition" not only that Congress prohibited banks from entering this field of endeavor, but that it did so in part for reasons stemming from the fact of the resulting competition. See pp. 14–16, 19–21, *ante.* However, the Court cannot mean by this phrase that it was Congress' purpose to protect petitioners' class against competitive injury for, as all three judges on the court below agreed, neither the language of the pertinent provisions of the Class-Steagall Act nor the legislative his-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 19, 1971

Rec'd 3/10/71

RE: Nos. 59 & 61 - National Association of Securities Dealers v. S. E. C. and Investment Co. Institute v. Camp

Dear Potter:

I agree.

Sincerely,

W.J.B. Jr.

Mr. Justice Stewart

cc: The Conference

TM

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Stewart, J.

Circulated: FEB 16 1971

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 59 & 61.—OCTOBER TERM, 1970

National Association of Securities Dealers, Inc., Petitioner, 59 *v.* Securities and Exchange Commission et al. Investment Company Institute et al., Petitioners, 61 *v.* William B. Camp, Comptroller of The Currency, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[February —, 1971]

MR. JUSTICE STEWART delivered the opinion of the Court.

These companion cases involve a double-barreled assault upon the efforts of a national bank to go into the business of operating a mutual investment fund. The petitioners in No. 61 are an association of open-end investment companies and several individual such companies. They brought an action in the United States District Court for the District of Columbia, attacking portions of Regulation 9 issued by the Comptroller of the Currency,[1] on the ground that this Regulation, in purporting to authorize banks to establish and operate collective investment funds, sought to permit activities prohibited to national banks or their affiliates by various provisions of the Glass-Steagall Banking Act of 1933.[2] The peti-

[1] 12 CFR § 9 (1970).

[2] The provisions of the Glass-Steagall Act are codified in various sections scattered through Title 12 of the United States Code.

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 11, 1971

Re: No. 61 - Investment Co. Institute v. Camp

Dear John:

Thank you for your letter of March 10.

I agree that the conclusion that a competitor has standing does not necessarily mean that he is entitled to relief after showing that agency action is ultra vires or otherwise invalid. I do not understand Data Processing to eliminate the need to establish that Congress intended to prohibit the competition of which the plaintiff complains. Cases in which competitors seek relief from agency action that gives an advantage to the competition, or that authorizes competition that Congress has not sought to proscribe, or that gives the Government's business to one competitor rather than another raise questions concerning entitlement to relief that were not decided in Data Processing and are not decided here. In this case we conclude that Congress did intend to prohibit the competition of which the petitioners complain.

If Data Processing is ambiguous, Arnold Tours v. Camp, 400 U.S. 45, makes it plain that standing and entitlement to relief do not turn on whether Congress legislated against competition for the purpose of protecting competitors. There we rejected the First Circuit's reading of Data Processing as requiring "proof of Congressional solicitude," proof that Congress "had protection of . . . competitors specifically in mind." 428 F.2d 359, 361. It is enough that Congress intended to prohibit competition for whatever reason and did not intend to deny relief to one aggrieved by illegal competition. In my view there should be no presumption that judicial review of a Congressional prohibition on competition is limited to a situation where the prohibition was for the benefit of a special interest. And I think it disserves the important purposes which underlie a prophylactic prohibition to provide review only if the regulated industry loses at the administrative level.

WJ

I am not aware of support for a concept of discretionary standing. I have difficulty in seeing what criteria would guide the exercise of this discretion. And I fear that the exercise of district court discretion would prove unreviewable. Of course there is often discretion to deny the equitable relief sought in administrative review cases under the criteria set forth in your opinions for the Court in Abbott Laboratories v. Gardner, 387 U. S. 136, and companion cases. I am inclined to think that this tool is adequate to avoid unwarranted judicial interference in the administrative process.

Sincerely yours,

P.S.

Mr. Justice Harlan

Copies to the Conference

p. 21

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan ✓
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: MAR 11 1971

Nos. 61 & 59.—October Term, 1970

Recirculated: _____

Investment Company Institute et al., Petitioners, 61 *v.* William B. Camp, Comptroller of The Currency, et al. National Association of Securities Dealers, Inc., Petitioner, 59 *v.* Securities and Exchange Commission et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[February —, 1971]

Mr. Justice Stewart delivered the opinion of the Court.

These companion cases involve a double-barreled assault upon the efforts of a national bank to go into the business of operating a mutual investment fund. The petitioners in No. 61 are an association of open-end investment companies and several individual such companies. They brought an action in the United States District Court for the District of Columbia, attacking portions of Regulation 9 issued by the Comptroller of the Currency,[1] on the ground that this Regulation, in purporting to authorize banks to establish and operate collective investment funds, sought to permit activities prohibited to national banks or their affiliates by various provisions of the Glass-Steagall Banking Act of 1933.[2] The peti-

[1] 12 CFR § 9 (1970).

[2] The provisions of the Glass-Steagall Act are codified in various sections scattered through Title 12 of the United States Code.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 4, 1971

Re: Nos. 59 & 61 - National
Assn of Securities Dealers
v. SEC

Dear Potter:

Please join me in your opinion in this case. Mine was a weak vote the other way but I am content with your disposition.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 29, 1971

Re: Nos. 59 and 61 - Nat'l Ass'n of Securities Dealers v. SEC, etc.

Dear Potter:

Please join me.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

March 8, 1971

Re: No. 59 - National Association of Securities Dealers v. SEC
No. 61 - Investment Company Institute v. Camp

Dear Potter:

You have prepared a careful and strong opinion in favor of the petitioners in these cases. I shall try my hand at a short dissent, and hope to get it to you by Thursday. It may prove to have no substance.

Sincerely,

H.A.B.

Mr. Justice Stewart

cc: The Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

1st DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 3/10/71

Nos. 61 & 59.—OCTOBER TERM, 1970

Recirculated: _____

Investment Company Institute et al., Petitioners,
61 *v.*
William B. Camp, Comptroller of The Currency, et al.

National Association of Securities Dealers, Inc., Petitioner,
59 *v.*
Securities and Exchange Commission et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[March —, 1971]

MR. JUSTICE BLACKMUN, dissenting.

The Court's opinion and judgment here, it seems to me, are based more on what is deemed to be appropriate and desirable national banking *policy* than on what is a necessary judicial construction of the Glass-Steagall Act of almost four decades ago. It is a far different thing to be persuaded that it is wise policy to keep national banks out of the business of operating mutual investment funds, despite the safeguards which the Comptroller of the Currency and the Securities and Exchange Commission have provided, than it is to be persuaded that existing and somewhat ancient legislation requires that result. Policy considerations are for the Congress and not for this Court.

I recognize and am fully aware of the factors and of the economic considerations that led to the enactment of the Glass-Steagall Act. The second decade of this century is not the happiest chapter in the history of American banking. Deep national concerns emerged

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 25, 1970

PERSONAL

Re: No. 60 - Perez v. Ledesma

Dear Bill:

You will recall I put you down for No. 60 - Perez v. Ledesma because you had joined the majority to reverse. Only Bill Douglas is in dissent with an affirmance.

This week again the assignments were extraordinarily difficult because of the way the votes fell and I was, of course, trying to spread the assignments around as much as possible. Consulting my notes it occurs to me that this may not be very much to your taste in view of your position on the "Dombrowski and declaratory judgment" problem generally. If that is the case, please do not hesitate to let me know and we will see if some other solution can be worked out.

The net of it is, as I read my conference notes and votes, that a majority of the Court sees the action of the Fifth Circuit as a combination declaratory judgment and injunction, even though they made an effort to cover up the injunction aspect.

Regards,

WEB

Mr. Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 17, 1970

Re: No. 60 - Perez v. Ledesma

Dear Bill:

I find I cannot accept some of the distinctions you seek to make in your opinion where you collide with Hugo's opinions in the "Dombrowski group".

Hugo indicates he will write and if he develops his opinion consistent with his earlier line, I will probably join him.

Regards,

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 28, 1970

Re: No. 60 - Perez v. Ledesma

Dear Bill:

I find I cannot accept some of the distinctions you seek to make in your opinion where you collide with Hugo's opinions in the "Dombrowski group."

Hugo indicates he will write, and if he develops his opinion consistent with his earlier line, I will probably join him.

Regards,

W.E.B.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 7, 1971

Re: No. 60 - Perez v. Ledesma

Dear Hugo:

Please join me in your dissent which I hope has prospect of achieving four votes.

Regards,

WEB

Mr. Justice Black

cc: The Conference

TM
WD

LFP RM M

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 18, 1971

Re: No. 60 - Perez v. Ledesma

Dear Hugo:

In line with the discussion at the Conference it seems that Justice Brennan's proposed opinion in the above is not likely to attract a majority.

Since your dissent appears consistent with your position in the Dombrowski group, will you see if you can convert your proposed dissent into an opinion that will do the job.

Regards,

WEB

Mr. Justice Black

cc: The Conference

TM
WD

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 8, 1971

Re: No. 60 - Perez v. Ledesma

Dear Hugo:

Please join me in the above.

Regards,

WEB

WEB

Mr. Justice Black

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

December 14, 1970

MEMORANDUM FOR THE CONFERENCE

Re: No. 60- Perez v. Ledesma

With reference to the above Court opinion, I intend as soon as possible to write a full dissent covering it.

Sincerely,

H. L. B.

The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al. | On Appeal from the United States District Court for the Eastern District of Louisiana.

[January —, 1971]

Mr. Justice Black, dissenting.

Given our decisions today in No. 2, *Younger* v. *Harris, ante;* No. 7, *Samuels* v. *Mackell, ante;* No. 9, *Fernandez* v. *Mackell, ante;* No. 4, *Boyle* v. *Landry, ante;* No. 83, *Byrne* v. *Karalexis, ante;* and No. 41, *Dyson* v. *Stein, ante,* in which we have determined when it is appropriate for a federal court to intervene in the administration of a state's criminal laws, the disposition of this case should not be difficult.

Ledesma and the other appelles operated a newsstand in the Parish of St. Bernard, Louisiana, where they displayed for sale allegedly obscene magazines, books, and playing cards. As a result of this activity, appellees were charged in four informations filed in state court with violations of Louisiana statute, LSA–RS 14–106, and St. Bernard Parish Ordinance 21–60. After the state court proceedings had commenced by the filing of the informations, appellees instituted the instant suit in the United States District Court for the Eastern District of Louisiana, New Orleans Division. Since the appellees sought a judgment declaring a state statute of statewide application unconstitutional, together with an injunction against pending or future prosecutions under the statute, a three-judge court was convened. That court held the Louisiana statute constitutional on

1,3,4,5,6,7,8

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Black, J.

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Circulated:

Recirculated: JAN 15 1971

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al. | On Appeal from the United States District Court for the Eastern District of Louisiana.

[January —, 1971]

Mr. Justice Black, with whom The Chief Justice and Mr. Justice Blackmun join, dissenting.

Given our decisions today in No. 2, *Younger* v. *Harris, ante;* No. 7, *Samuels* v. *Mackell, ante;* No. 9, *Fernandez* v. *Mackell, ante;* No. 4, *Boyle* v. *Landry, ante;* No. 83, *Byrne* v. *Karalexis, ante;* and No. 41, *Dyson* v. *Stein, ante,* in which we have determined when it is appropriate for a federal court to intervene in the administration of a state's criminal laws, the disposition of this case should not be difficult.

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

From: Black, J.

Circulated: _____

Recirculated: JAN 26 1971

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al.

On Appeal from the United States District Court for the Eastern District of Louisiana.

[February —, 1971]

Mr. Justice Black delivered the opinion of the Court.

Given our decisions today in No. 2, *Younger* v. *Harris, ante;* No. 7, *Samuels* v. *Mackell, ante;* No. 9, *Fernandez* v. *Mackell, ante;* No. 4, *Boyle* v. *Landry, ante;* No. 83, *Byrne* v. *Karalexis, ante;* and No. 41, *Dyson* v. *Stein, ante,* in which we have determined when it is appropriate for a federal court to intervene in the administration of a state's criminal laws, the disposition of this case should not be difficult.

Ledesma and the other appellees operated a newsstand in the Parish of St. Bernard, Louisiana, where they displayed for sale allegedly obscene magazines, books, and playing cards. As a result of this activity, appellees were charged in four informations filed in state court with violations of Louisiana statute, LSA–RS 14–106, and St. Bernard Parish Ordinance 21–60. After the state court proceedings had commenced by the filing of the informations, appellees instituted the instant suit in the United States District Court for the Eastern District of Louisiana, New Orleans Division. Since the appellees sought a judgment declaring a state statute of statewide application unconstitutional, together with

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al. | On Appeal from the United States District Court for the Eastern District of Louisiana.

[February —, 1971]

Mr. Justice Black delivered the opinion of the Court.

Given our decisions today in No. 2, *Younger* v. *Harris, ante;* No. 7, *Samuels* v. *Mackell, ante;* No. 9, *Fernandez* v. *Mackell, ante;* No. 4, *Boyle* v. *Landry, ante;* No. 83, *Byrne* v. *Karalexis, ante;* and No. 41, *Dyson* v. *Stein, ante,* in which we have determined when it is appropriate for a federal court to intervene in the administration of a state's criminal laws, the disposition of this case should not be difficult.

I

Ledesma and the other appellees operated a newsstand in the Parish of St. Bernard, Louisiana, where they displayed for sale allegedly obscene magazines, books, and playing cards. As a result of this activity, appellees were charged in four informations filed in state court with violations of Louisiana statute, LSA–RS 14–106, and St. Bernard Parish Ordinance 21–60. After the state court proceedings had commenced by the filing of the informations, appellees instituted the instant suit in the United States District Court for the Eastern District of Louisiana, New Orleans Division. Since the appellees sought a judgment declaring a state statute of

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al. | On Appeal from the United States District Court for the Eastern District of Louisiana.

[January —, 1971]

Mr. Justice Douglas, dissenting.

The ordinance held unconstitutional makes it a crime to display or sell pictures of "nude or semi-nude female persons wherein the female breast or any sexual organ is shown . . . and where because of the number or manner of portrayal . . . they are designed to appeal predominantly to the prurient interest."

This ordinance is struck down because of its vagueness.

One test which the Court approved in *Roth* v. *United States,* 354 U. S. 476, 489, was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." And in the present case the District Court sustained the constitutionality of a provision of the Louisiana law (LSA–RS 14–106) which makes a crime out of displaying for sale any "obscene" publication "with the intent to primarily appeal to the prurient interest of the average person."

It is difficult for me to see why the standard imposed by St. Bernard Parish is any more vague than the standard we approved in *Roth.*[1]

[1] The only part of the Bernard Parish ordinance under which a prosecution was apparently laid against appellee Ledesma was § 6 whose essential parts are quoted in the text.

The three-judge court, however, held the whole ordinance uncon-

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al. | On Appeal from the United States District Court for the Eastern District of Louisiana.

[January —, 1971]

Mr. Justice Douglas, dissenting.

I

The three-judge panel was properly convened under § 2281 to consider the validity of a Louisiana statute of general application. That court was also asked, however, to pass on an ordinance of St. Bernard Parish.

It is by now elementary that a three-judge court may not be convened to consider the validity of a local ordinance or a statute of local application. *Moody* v. *Flowers,* 387 U. S. 97, 101. The District Court recognized that it had no jurisdiction to pass upon the constitutionality of the ordinance; but it expressed "its views . . . in the interest of judicial economy [since it was] shared by the initiating federal district judge and is adopted by reference in his opinion issued contemporaneously herewith." It then stated that "We have examined the ordinance and find it to be unconstitutional and unenforceable."

The single District Judge then ordered that a judgment be entered, holding that the ordinance was unconstitutional. Later on, the clerk also entered a judgment to that effect for the three-judge court.

The judgment entered pursuant to the order of the single District Judge should go to the Court of Appeals

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

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From: Douglas, J.

1/5/71

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al.	On Appeal from the United States District Court for the Eastern District of Louisiana.

[January —, 1971]

Mr. Justice Douglas, dissenting.

I

The three-judge panel was properly convened under § 2281 to consider the validity of a Louisiana statute of general application. That court was also asked, however, to pass on an ordinance of St. Bernard Parish.

It is by now elementary that a three-judge court may not be convened to consider the validity of a local ordinance or a statute of local application. *Moody* v. *Flowers*, 387 U. S. 97, 101. The three-judge court recognized that it had no jurisdiction to pass upon the constitutionality of the ordinance; but it expressed "its views . . . in the interest of judicial economy [since it was] shared by the initiating federal district judge and is adopted by reference in his opinion issued contemporaneously herewith." 304 F. Supp. 662, 670, n. 31. It then stated that "We have examined the ordinance and find it to be unconstitutional and unenforceable." *Ibid.*

The single District Judge then ordered that a judgment be entered, holding that the ordinance was unconstitutional. 304 F. Supp., at 671. Later on, the clerk also entered a judgment to that effect for the three-judge court.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

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6

SUPREME COURT OF THE UNITED STATES

Douglas, J.

No. 60.—October Term, 1970

1/8/71

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al.	On Appeal from the United States District Court for the Eastern District of Louisiana.

[January —, 1971]

Mr. Justice Douglas, dissenting.

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The single District Judge then ordered that a judgment be entered, holding that the ordinance was unconstitutional. 304 F. Supp., at 671. That order is obviously the judgment which is the basis of an appeal. There is no magic in the word "judgment" itself. Later on, the clerk also entered a judgment to that effect for the three-judge court.

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1/8/71

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SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

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SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al.	On Appeal from the United States District Court for the Eastern District of Louisiana.

1/9/71

[January —, 1971]

Mr. Justice Douglas, dissenting.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

p 3

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From: Douglas, J.

Circulated: _____

Recirculated: 1-11

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al. | On Appeal from the United States District Court for the Eastern District of Louisiana.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
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Mr. Justice Blackmun

1, 3

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From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

No. 60.—OCTOBER TERM, 1970

Circulated: _____

Recirculated: 2-4

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al.	On Appeal from the United States District Court for the Eastern District of Louisiana.

[February —, 1971]

MR. JUSTICE DOUGLAS.

I

The three-judge panel was properly convened under § 2281 to consider the validity of a Louisiana statute of general application. That court was also asked, however, to pass on an ordinance of St. Bernard Parish.

But I agree with part III of the opinion of the Court written by MR. JUSTICE BLACK that we have no jurisdiction over that phase of the litigation.

It is by now elementary that a three-judge court may not be convened to consider the validity of a local ordinance or a statute of local application. *Moody* v. *Flowers*, 387 U. S. 97, 101. The three-judge court recognized that it had no jurisdiction to pass upon the constitutionality of the ordinance; but it expressed "its views . . . in the interest of judicial economy [since it was] shared by the initiating federal district judge and is adopted by reference in his opinion issued contemporaneously herewith." 304 F. Supp. 662, 670, n. 31. It then stated that "We have examined the ordinance and find it to be unconstitutional and unenforceable." *Ibid.*

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