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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-4200

AARON HENRY, et al.,

Plaintiffs-Appellees,

MISSISSIPPI ACTION FOR PROGRESS,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee

v.

FIRST NATIONAL BANK OF CLARKSDALE, et al.,

Defendants-Appellants

On Appeal from the United States District Court
for the Northern District of Mississippi

BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in enjoining white merchants in Port Gibson, Mississippi, from enforcing a state court judgment in their favor against the National Association for the Advancement of Colored People, the Mississippi Action for Progress, and others, pending the appeal of that judgment.

2. Whether the district court's injunctions were precluded by the anti-injunction statute (28 U.S.C. 2283).

3. Whether the district court's injunctions were precluded by the doctrine of Younger v. Harris, 401 U.S. 37 (1971).

4. Whether the district court properly allowed the United States to intervene to protect its lien interest in property and funds in the possession of the Mississippi Action for Progress.

INTEREST OF THE UNITED STATES

The Attorney General has been assigned enforcement responsibility for a variety of federal civil rights statutes. Such statutes include those prohibiting racial discrimination in employment (42 U.S.C. 2000e et seq.), housing (42 U.S.C. 3601 et seq.), public accommodations (42 U.S.C. 2000a et seq.), public facilities (42 U.S.C. 2000b et seq.), public education (42 U.S.C. 2000c-6), and voting (42 U.S.C. 1971 et seq.). Many of these statutes also create a cause of action for private parties.

While the NAACP is a private organization, representing the interest of a discrete group, the efforts of the NAACP and similar organizations to use peaceful means to eradicate racial discrimination have in many instances operated to effectuate the national policy embodied by the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution and by various civil rights acts. Because of the Attorney General's limited resources, such efforts by private organizations are essential to guarantee equal rights for all Americans.

The state court decree preliminarily enjoined by the district court unconstitutionally limits the kinds of peaceable activities in which civil rights organizations may engage. The Attorney General has an interest in ensuring that the NAACP may continue its normal civil rights activities while pursuing its appeal from that decree. This case also involves issues concerning the extent to which the anti-injunction statute, 28 U.S.C. 2283, and the doctrine of Younger v. Harris, 401 U.S. 37 (1971), may preclude civil rights suits by private parties under 42 U.S.C. 1983. An unfavorable ruling in this case may therefore adversely affect the ability of the Attorney General to fulfill his responsibilities under the civil rights laws.

Additionally, the Mississippi Action for Progress (MAP), a Mississippi corporation and a defendant in the chancery court action, receives substantial federal funding. Under the chancellor's judgment, funds and property in MAP's possession in which the federal government has a lien interest are liable to attachment by the state court plaintiffs.

Pursuant to its interests in this case, the United States participated in the proceedings below. The United States intervened as a party plaintiff and obtained a preliminary injunction that protects its interest in funds and property

in MAP's possession. In addition, the United States filed a supplemental memorandum -- in the nature of an amicus curiae memorandum -- supporting the issuance of an injunction prohibiting enforcement of the state court final decree against the NAACP pending the appeal of that decree. The United States consequently is filing this brief in its capacity both as amicus and as a party.

STATEMENT CONCERNING ORAL ARGUMENT

The Government believes that oral argument would be helpful in this case. The case presents important and complex questions of federal-state relations, First Amendment rights, and equity jurisprudence. The Court, after reading the briefs, may wish to explore these questions further with counsel, and this could be done effectively at oral argument. In addition, oral argument would afford the Government an opportunity to stress the strong public interest in the affirmance of the orders of the district court, which is a vital element in this case.

STATEMENT [1]

A. Procedural History

1. In April 1966, a group of black citizens in Port Gibson, Mississippi, began a boycott of white merchants in Port Gibson to protest alleged racial discrimination by the merchants and city officials. The boycott was carried out primarily by picketing, leafleting, and public meetings. The boycott lasted several years and involved some threats and violence.

On or about November 4, 1969, the merchants filed suit in the Chancery Court for the First Judicial District of Hinds County, Mississippi, against the NAACP, a New York corporation doing business in Mississippi; the Mississippi Action for Progress, a nonprofit Mississippi corporation; and a number of individuals. The suit claimed that the boycott violated Mississippi anti-trust, secondary boycott, and conspiracy laws. The merchants sought an order enjoining the boycott and damages of over $3,500,000.00.

1/ Except where otherwise indicated, the procedural history is derived from this Court's previous opinion in this case, Henry v. First National Bank of Clarksdale, 444 F.2d 1300 (5th Cir. 1971), cert. denied, 405 U.S. 1019 (1972).

The merchants also joined as defendants about 50 Mississippi banks alleged to have funds of the NAACP in their possession. Pursuant to Miss. Code Ann. § 2730 (1940),[2/] the merchants sought to have these funds attached. Shortly after the filing of the suit, the chancery court clerk, without notice or hearing, began serving writs of attachment against these funds. The funds were deposited in accounts belonging to the Mississippi State Conference of the NAACP and local branches of the NAACP in Mississippi. These organizations claimed that they were completely autonomous and independent from the national NAACP, that they were not named as defendants in the chancery court action, and that, as residents of Mississippi, they were not subject to the non-resident attachment statutes.

2. On November 7, 1969, the Mississippi State Conference and the Coahoma Branch (individually and on behalf of all other local branches similarly situated) filed an action against the banks in the United States District Court for the Northern District of Mississippi. The action, under 42 U.S.C. 1983, claimed that the attachments violated plaintiffs' due process rights (R 43-54; A 1-9). The complaint was filed by Aaron Henry, President of both the Mississippi State Conference and the Coahoma Branch. Plaintiffs moved

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2/ Section 2730 authorizes the attachment of property of non-residents without notice or hearing.

for a temporary restraining order and a preliminary injunction (R 55-57). At a hearing on the TRO in November 1969, one of the banks appeared and moved to have the merchants made parties on the ground that the merchants claimed an interest in the funds. The court granted the motion to join the merchants and issued the TRO (R 58-59).

A hearing on plaintiffs' motion for a preliminary injunction was held on December 1, 1969 (R 1-42). The merchants appeared and contested the motion. On December 15, 1969, the court issued a preliminary injunction. It ordered the banks to release all funds held pursuant to the writs of attachment, upon posting by plaintiffs of a bond in the amount of 110% of the funds. It further enjoined the merchants from subjecting the funds to attachment or other process causing the plaintiffs to be deprived of the use of their funds (R 78-81; A 28-30).[3/] The issuance of this preliminary injunction was not appealed.

On the same day the injunction was signed, the federal plaintiffs filed an amended complaint. The NAACP and MAP were added as parties plaintiff, and Aaron Henry was named as an individual plaintiff representing the class of all individuals named as defendants in the state court case. The amended complaint sought an injunction prohibiting the

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3/ The injunction was signed by the court on December 15, 1969, and entered by the clerk on December 16, 1969.

merchants from further prosecuting the chancery court suit and a declaratory judgment that the statutes upon which the merchants were relying were unconstitutional (R 235-257; A 10-27).

On December 31, 1969, the plaintiffs filed a motion for a preliminary injunction restraining the merchants from further prosecuting the chancery court action (R 89-92). On June 9, 1970, the district court preliminarily enjoined the merchants from proceeding with their suit. See Henry v. First National Bank of Clarksdale, 50 F.R.D. 251 (N.D. Miss. 1970) (R 188-234; A 33-68).

3. The defendants appealed the June 9, 1970, order to this Circuit. The Court vacated the district court's June 9th injunction and ordered the amended complaint dismissed for lack of jurisdiction (R 301-329). It held that federal courts have jurisdiction under 42 U.S.C. 1983 only if rights are deprived by virtue of "state action" and that the mere commencement of a private tort suit in state court was insufficient to satisfy the "state action" requirement. The Court stated that "[o]nly after both parties to a private civil action [have] had their day in court and the court has reached its decision and rendered its judgment does the full power of the state come into play in enforcing the judgment." Henry v. First National Bank of Clarksdale,

supra, 444 F.2d at 1310. The Court made it clear, however, that the district court's December 15, 1969, injunction (supra, p. 7) -- which had not been appealed -- remained effective. Id. at 1305-1306.

4. The chancery court action proceeded after the dismissal of the amended complaint. Following a lengthy trial, the court ruled in the merchants' favor. In an opinion issued August 9, 1976, the chancellor ruled that the boycott violated Mississippi law (R 404-487; A 138-199). In his final decree of August 19, 1976, the chancellor ordered the NAACP, MAP, and 128 individual defendants to pay the merchants $1,250,699 in damages, penalties, and attorney's fees. He also enjoined the defendants in that action from engaging in a variety of acts, including persuading, soliciting or advising anyone not to patronize the merchants; and picketing or patrolling the premises of any of the merchants. The court also ruled that the bank funds were properly subject to attachment and ordered the banks to pay the funds to the merchants, to be applied towards the payment of damages (R 488-507; A 199-215).[4/]

4/ The funds in the accounts totaled $16,324.94.

The chancery court defendants noticed an appeal from the final decree. To protect their assets pending appeal, they were required by Mississippi law to post a supersedeas bond of 125% of the judgment, or $1,563,373.75. See Miss. Code Ann. §§ 11-51-31, 11-51-59 (1972).

5. When it appeared that the state court defendants were not going to be able to raise sufficient funds to post a supersedeas bond within the time specified by Mississippi law, they again sought relief in the United States District Court for the Northern District of Mississippi.[5/] On October 1, 1976, the NAACP filed in that court a motion for leave to file a "supplemental and amended verified complaint" (R 343-344; A 118), an application for a temporary restraining order (R 337-338; A 116), and a motion for a preliminary injunction (R 341-342; A 117). The supplemental complaint averred that the chancellor's final decree was unlawful and unconstitutional in that it (1) violated plaintiffs' rights under the First and Fourteenth Amendments; (2) violated 42 U.S.C. 1983; and (3) was contrary to the district court's order of December 15, 1969. The complaint prayed for, inter alia, a declaratory judgment that (1) the bank funds were the property of the Mississippi State Conference of the NAACP, the Coahoma Branch and the class it represents, and were not

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5/ The NAACP's motions for leave to appeal without posting the bond or with a reduced bond were denied by the Chancery Court and the Mississippi Supreme Court (R 544; A 226, R 548).

subject to attachment or disposition pursuant to the chancellor's final decree; and (2) that execution of the final decree, pending plaintiffs' appeal of the merits to the Mississippi Supreme Court and the United States Supreme Court, would violate their rights under the First and Fourteenth Amendments and 42 U.S.C. 1983. The complaint also asked for a temporary restraining order and preliminary and permanent injunctions restraining the merchants from taking any action to enforce the chancellor's final decree until the plaintiffs had exhausted all appeals to the Mississippi Supreme Court and the United States Supreme Court (R 753-779; A 347-362). On October 1, 1976, the court granted the motion to file the supplemental complaint and issued a temporary restraining order (R 345-346; A 118-119).[6/]

On October 7, 1976, the United States filed a motion to intervene as a party plaintiff, and also filed a motion for a preliminary injunction (R 715-752; A 336-346). The complaint alleged that the Government had a complete lien interest in MAP's Headstart funds and property, which could not be interfered with by the state court defendants.

6/ The transcript of the proceedings of October 1, 1976, is Volume III of the Record on Appeal (A 93-115).

B. Hearing of October 8, 1976

On October 8, 1976, a hearing was held on the private plaintiffs' motion for a preliminary injunction.[7/] These plaintiffs presented affidavits of NAACP officials and other prominent persons demonstrating that the NAACP could not post the $1,563,373.75 supersedeas bond without having to terminate virtually all of its essential operations. See affidavits of Margaret Bush Wilson, Chairman of the National Board of Directors of the NAACP (R 347-357; A 120-123); Gloster B. Current, Administrator of the NAACP (R 358-383; A 123-128); Aaron E. Henry, President of the Mississippi State Conference of the NAACP (384-387; A 128a-128b); Arthur S. Flemming, Chairman of the U.S. Commission on Civil Rights (R 388-391; A 129-131); General Daniel James, Jr., United States Air Force (R 392-396; A 131-134); Clarence Mitchell, Jr., Director of the Washington Bureau of the NAACP (R 397-401; A 135-137); and Roy Wilkins, Executive Director of the NAACP (R 780-792; A 362-369). The court took the plaintiffs' motion for a preliminary injunction under advisement and extended the October 1, 1976, temporary restraining order to October 21, 1976 (R 800; A 373).

7/ The transcript of the October 8th proceedings is Volume IV of the Record on Appeal (A 267-335).

The court also addressed the motion of the United States to intervene as party plaintiff, its intervenor's complaint for injunctive relief, and its motion for a preliminary injunction.[8/] The court granted the United States's application for intervention and took under advisement its motion for a preliminary injunction (R 801).[9/]

8/ In addition to these documents, the United States also filed a supplemental memorandum supporting the NAACP's motion for a preliminary injunction.

9/ In addition, the court denied the defendants' motions to dismiss and for a change of venue (R 802).

C. Opinion and Orders of the District Court

On October 20, 1976, the court issued a memorandum opinion (R 817-828; A 387-394) and three orders of injunction (R 829-837; A 394-400).[10/] The court first held that 28 U.S.C. 2283, the anti-injunction statute, did not prohibit it from issuing an injunction. It found that the requested relief "does not contemplate interference with the proceedings in the state court," but "applies to the enforcement of the judgment by the individual state court complainants and extends only for that period necessary to permit an exhaustion of appellate remedies" (R 820; A 389). The court also found that an injunction was necessary to protect its order of December 15, 1969, in which it enjoined the merchants from attaching the funds of the Mississippi State Conference of the NAACP and the local NAACP branches deposited in the Mississippi banks (R 818-820; A 387-389).

The district court next ruled that 28 U.S.C. 2281 did not require the case to be heard by a three-judge court. The court noted that section 2281 had been repealed by Congress effective August 12, 1976, and that the chancellor's final decree, which gave rise to the NAACP's cause of action, was not entered until August 19, 1976. Second, the court

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10/ The opinion is reported at 424 F. Supp. 633.

observed that the NAACP did not challenge the constitutionality of the supersedeas bond requirement of the Mississippi Code. Rather, it argued only that enforcement of the chancellor's final decree would infringe upon constitutionally protected rights (R 821-822; A 389-390).

The court then addressed the intervenor's complaint of the United States and its accompanying motion for a preliminary injunction (R 822-823; A 390-391). It ruled that the United States had a complete lien interest in all funds and property purchased with funds advanced to MAP by the United States Department of Health, Education and Welfare. The court concluded that injunctive relief was appropriate, since "[t]he United States is now threatened with immediate, irreparable harm as a result of the state judgment against MAP" (R 823; A 391).

Next the court turned to the NAACP's motion for a preliminary injunction. It ruled that the requisite "state action" -- which the Fifth Circuit had previously found lacking -- was now present by virtue of the entry of the chancellor's final decree (R 824-825; A 391-392). The court stated that "plaintiffs will suffer immediate and irreparable harm if the enforcement of the state decree by defendants is not enjoined" (R 826; A 393). To require plaintiffs to comply with the chancellor's decree would "seriously impair their rights to free speech and association. This is in and of itself an irreparable injury" (ibid.). Moreover, the

court found, to post the supersedeas bond, the NAACP would "be required to borrow a substantial portion of the amount of the bond and to deplete funds necessary to conduct its normal operations" (ibid.).

The court issued three orders of injunction. It enjoined the merchants from: (1) seizing the funds on deposit in the Mississippi banks (R 834-837; A 398-400); (2) seizing any property or funds of MAP received from HEW pursuant to Title V of the Economic Opportunity and Community Partnership Act of 1974, 42 U.S.C. 2921 et seq. (R 829-830; A 394-395); and (3) taking any action to enforce the chancellor's final decree (R 831-833; A 396-397). The court provided, however, that its order did not prohibit enforcement of those provisions of the chancellor's decree prohibiting physical violence, damage to real or personal property, or the obstruction of the entrance to any merchant's business (R 832; A 396).

Defendants filed a notice of appeal from the district court's three injunctive orders on November 11, 1976 (R 842-843; A 402-403).

INTRODUCTION AND SUMMARY OF ARGUMENT

I

Earlier in this brief (pp. 2-4), the United States set forth its dual interests in this case -- i.e., its interest in the continued effective operation of the NAACP and its lien interest in MAP's assets. In Part I of our argument, we contend, essentially in the role of an amicus curiae, that the October 20, 1976, preliminary injunctions were necessary to preserve the ability of the NAACP to protect the legal rights of black citizens during its appeal of the chancellor's judgment. In Part II of the argument, we contend that the district court properly allowed the United States to intervene as a party plaintiff to protect its lien interest in funds and property in MAP's possession, and that it properly issued a preliminary injunction to protect that interest.

This case concerns the propriety of preliminary injunctions issued by a district court. In reviewing a preliminary injunction, an appellate court may only consider whether issuance of the injunction constituted an abuse of discretion. Brown v. Chote, 411 U.S. 452, 457 (1973); Morgan v. Fletcher, 518 F.2d 236 (5th Cir. 1975). The question presented by this appeal therefore is whether the district court abused its discretion in preliminarily enjoining the merchants from enforcing the chancellor's final decree, during the appeal of that decree.

II

The district court's injunctive orders satisfy the standard requirements for the issuance of a preliminary injunction. Plaintiffs-appellees demonstrated a likelihood of success on the merits. The chancellor's decree enjoins and penalizes activities protected by the First Amendment and conflicts with the district court's injunction of December 15, 1969. The requisite "state action," which this Court found wanting in the previous appeal in this case, is now present by virtue of the chancellor's final decree. To protect their assets during the state court appeal, plaintiffs-appellees were required by state law to post a supersedeas bond of over $1.5 million. The NAACP established that it could not post such a bond without terminating virtually all of its essential activities and that immediate seizure of its assets by the merchants in satisfaction of the state court decree would have threatened the continued existence of that organization. These considerations also apply to the other state court defendants. Plaintiffs-appellees therefore demonstrated that they would have suffered irreparable injury had the injunctions not issued. The injunctions do not substantially harm other interested parties: since the chancellor's damage award is to bear interest from the date of issuance, the merchants will not suffer substantial harm even if they are successful in the state appeal. In addition, the injunctions were in

the public interest. The NAACP, whose existence is threatened by the chancellor's final decree, has for many years been a leading advocate for the constitutional and civil rights of black Americans. Moreover, plaintiffs-appellees in this action seek to vindicate their First Amendment right to freedom of speech -- one of the cornerstones of our democracy.

III

The district court properly asserted jurisdiction in this case. The anti-injunction statute, 28 U.S.C. 2283, did not deprive the district court of jurisdiction to issue the injunctions. That statute prohibits a federal court from enjoining a state court proceeding "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The anti-injunction statute did not bar the district court's injunctive orders for several reasons. First, the court's orders do not stay the state court appellate proceedings. Rather, they prohibit the chancery court plaintiffs from enforcing portions of the chancellor's decree during the appeal of that decree. Second, both the Supreme Court and this Court have held that 42 U.S.C. 1983, upon which the instant case is in part based, is an Act of Congress "expressly authoriz[ing]" a federal injunction against state court proceedings. And, third, since the chancellor's final decree was in direct conflict with the district court's prior injunction of December 15, 1969, the October 20, 1976, injunctions were

"necessary ... to protect or effectuate [the district court's] judgment[]."

Similarly, the principle of Younger v. Harris, supra, did not bar the October 20th injunctions. Younger held that, except in unusual circumstances, a federal court may not enjoin a state court criminal prosecution. While the Younger principle has been extended to civil enforcement proceedings by state or local officials, it does not apply where the action to be enjoined is a state civil suit between private parties. Moreover, as indicated above, the injunctions under review do not interfere with a state court decisional process. Rather, they prevent enforcement of a state court judgment pending the appeal of that judgment. And, in any event, the Younger doctrine permits federal interference with state court proceedings when necessary to prevent "great and immediate" irreparable injury. The exigent circumstances of this case bring it within this exception to the Younger rule.

Defendants-appellants' arguments that the state court had exclusive in rem jurisdiction over the attached bank accounts, and that the subsequently dismissed amended complaint of December 15, 1969, superseded the original complaint of November 7, 1969, are without substance.

IV

The district court's grant of preliminary injunction in favor of the Government should be affirmed since the district court acted well within its discretion. Through the operation of the Headstart-Follow Through Act and its implementing regulations, an equitable lien upon all federal funds advanced to MAP by the Government, and all property purchased with such funds, was created in favor of the Government. Since the Government has not consented to the invocation of state judicial processes against its lien, the district court properly enjoined defendants-appellants from taking any steps to interfere with the Government's lien. Moreover, the district court's preliminary injunction furthers the public interest in the uninterrupted provision of needed health, educational, nutritional, social and other services to 4,950 pre-school children in 20 Mississippi counties.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING ITS INJUNCTIVE ORDERS OF OCTOBER 20, 1976 11/

A. The District Court's Orders Satisfy the Usual Criteria for the Issuance of Preliminary Injunctions.

The October 20th orders comply with the usual standards for the issuance of preliminary injunctions. To demonstrate entitlement to a preliminary injunction, a plaintiff must show: (1) that he is likely to succeed on the merits; (2) that he will suffer irreparable injury if the injunction is not granted; (3) that the granting of an injunction will not substantially harm other interested parties; and (4) that the public interest will be served by granting the injunction. Morgan v. Fletcher, supra; Virginia Petroleum Jobbers Ass'n v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958).

1. Plaintiffs-appellees demonstrated a likelihood of success on the merits.

In reviewing the issuance of a preliminary injunction, an appellate court does not determine the merits of the controversy. Rather, "[n]o attention is paid to the merits of the controversy beyond that necessary to determine the presence or absence of an abuse of discretion ...." Di Giorgio v. Causey, 488 F.2d 527, 529 (5th Cir. 1973). See also Morgan v. Fletcher, supra, 518 F.2d at 238.

11/ The principles discussed in Part I of our argument apply to each of the three injunctions under review. Additional considerations applicable only to that injunction protecting the United States's lien interest in MAP's assets are set forth in Part II of our argument.

Plaintiffs-appellees' supplemental complaint filed October 1, 1976, states a cause of action under the First and Fourteenth Amendments and 42 U.S.C. 1983. 12/ Even though this is (except as to the assets of MAP in which the United States asserts an interest) a suit between private parties, the requisite "state action" -- which this Court found wanting in the previous appeal in this case -- is now present by virtue of the chancellor's final decree. 13/ Plaintiffs-appellees' contention that the state court has applied a rule of law that is constitutionally deficient for failing to provide safeguards for freedom of speech states a cause of action under the First and Fourteenth Amendments. New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964); Shelley v. Kraemer, 334 U.S. 1, 14-18 (1948); Edwards v. Habib, 397 F.2d 687, 690-696 (D.C. Cir. 1968),

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12/ 42 U.S.C. 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

13/ Defendants-appellants do not contend in their brief that the requisite state action is now lacking.

cert. denied, 393 U.S. 1016 (1969). The "color of law" requirement of 42 U.S.C. 1983 is the same as the "state action" requirement of the Fourteenth Amendment. United States v. Price, 383 U.S. 787, 794-795 n. 7 (1966); Greco v. Orange Memorial Hospital Corp., 513 F.2d 873, 877 n. 7 (5th Cir. 1975); Parish v. National Collegiate Athletic Association, 506 F.2d 1028, 1031 n. 6 (5th Cir. 1975).

Enforcement of the chancellor's final decree pending the appeal of that decree would infringe plaintiffs-appellees' First Amendment right to free speech, applicable to the states by virtue of the Fourteenth Amendment. The right to free speech is a right "secured by the Constitution" for purposes of 42 U.S.C. 1983. See, e.g., Douglas v. Jeannette, 319 U.S. 157 (1943); Smith v. Grady, 411 F.2d 181 (5th Cir. 1969). The relevant constitutional principles were summarized by the Supreme Court in Douglas v. Jeannette, supra, 319 U.S. at 162:

> We have repeatedly held that the Fourteenth Amendment has made applicable to the states the guaranties of the First. Schneider v. State, 308 U.S. 147, 160, n. 8 and cases cited; Jamison v. Texas, 318 U.S. 413. Allegations of fact sufficient to show deprivation of the right of free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth, and to state a cause of action under the Civil Rights Act, whenever it appears that the abridgement of the right is effected under color of a state statute or ordinance.

While the chancellor's final decree prohibits plaintiffs-appellees from engaging in some activities that are not protected by the Constitution, such as "using physical violence" and "inflicting damage to any real or personal property" (R 506; A 214), the decree also prohibits a number of peaceable activities associated with the boycott. Plaintiffs-appellees are prohibited, inter alia, from "[p]ersuading, soliciting [and] advising ... any person to withdraw and withhold his or her patronage or to cease trading with the [merchants]" and from "[p]icketing or patroling [sic] the premises of any of the [merchants]" (ibid.). Such peaceful conduct is protected by the First Amendment. See, e.g., Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) (city ordinance regulating content of expression of pickets held unconstitutional on equal protection grounds);[14/] Organization For A Better Austin v. Keefe, 402 U.S. 415 (1971) (peaceful distribution of informational literature protected by First Amendment); Edwards v. South Carolina, 372 U.S. 229 (1963) (peaceful assembly to protest alleged racial discrimination in state statutes protected by First Amendment); Thornhill v. Alabama, 310 U.S. 88 (1940) (anti-loitering and picketing statute on its face violated First and Fourteenth Amendments); Carlson v. California, 310 U.S. 106 (1940) (municipal ordinance making it unlawful for any person to carry or display any sign, banner, or badge in the vicinity

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14/ In Mosley, the Court indicated that "the equal protection claim in this case is closely intertwined with First Amendment interests." 408 U.S. at 95.

of any place of business for the purpose of inducing others to refrain from buying or working there, or for any person to loiter or picket in the vicinity of any place of business for that purpose, violates the First Amendment); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938) (peaceful picketing by non-employees against discriminatory employment practices upheld); Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969) (state court injunction prohibiting all picketing and speech directed toward boycott in certain area violated the First Amendment by prohibiting constitutionally protected activity as well as unprotected activity); Smith v. Grady, supra (preliminary injunction by federal district court violated the First Amendment insofar as it commanded absolute silence by pickets participating in boycott); Kirkland v. Wallace, 403 F.2d 413 (5th Cir. 1968) (state statute making it a misdemeanor to print or circulate notice that a boycott exists held unconstitutional on its face); Davis v. Francois, 395 F.2d 730 (5th Cir. 1968) (city ordinance narrowly limiting place and manner of picketing violated First Amendment); NAACP v. Thompson, 357 F.2d 831 (5th Cir. 1966) (peaceable demonstrations against racial discrimination that do not interfere with the use of streets and sidewalks are protected by the First Amendment); Kelly

v. Page, 335 F.2d 114 (5th Cir. 1964) (peaceful picketing to protest racial discrimination is protected by the First Amendment if it does not interfere with the use of streets and sidewalks).[15/]

The pertinent constitutional principles were recently summarized by the Supreme Court in Hudgens v. NLRB, 424 U.S. 507 (1976). There the Court stated:

> For while a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes, see Cox v. New Hampshire, 312 U.S. 569; Poulos v. New Hampshire, 345 U.S. 395, and may even forbid altogether such use of some of its facilities, see Adderley v. Florida, 385 U.S. 39; what a municipality may not do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression, Erznoznik v. City of Jacksonville, 422 U.S. 205. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95. 424 U.S. at 520; footnote omitted; emphasis by the Court.

The chancellor's decree prohibits those participating in the boycott from urging others not to do business with the merchants. It thus restricts expression solely on the basis of the content of that expression. In so doing, the decree contravenes the First Amendment.

15/ Defendants-appellants do not contend in their brief that the chancellor's final decree was consistent with the First Amendment.

Similarly, enforcement of the chancellor's award of damages would infringe plaintiffs-appellees' First Amendment rights. The law properly condemns acts of violence. However, it is one thing to award damages for unlawful acts of violence and quite another thing to award damages for the lawful exercise of free speech rights. But the chancellor made no effort to determine which business losses of the merchants were attributable to lawful boycott activity, and which to unlawful activity. Instead, he assessed damages against the state court defendants in the amount of the total losses the merchants sustained during those years in which the boycott occurred (and even during a period when the boycott was not in effect). Cf. United Mine Workers of America v. Gibbs, 383 U.S. 715, 729-735 (1966).[16/] The damage award therefore not only penalizes plaintiffs-appellees for participating in constitutionally protected activity but also -- perhaps even more effectively than the chancellor's injunction -- serves as a deterrent to the exercise of free speech rights in connection with the boycott.

16/ Gibbs dealt with violence and threats of violence in a labor dispute. The Court stated in Gibbs that "extreme and repeated acts of violence" like those in Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941), "might support the conclusion that all damages resulting from the picketing were proximately caused by its violent component or by the fear which that violence engendered. Where the consequences of peaceful and violent conduct are separable, however, it is clear that recovery may be had only for the latter." 383 U.S. at 731-732; footnote omitted.

The appropriateness of the district court's injunctions is best illustrated by the case of Machesky v. Bizzell, supra. Machesky involved a boycott by blacks of white merchants in Greenwood, Mississippi. The purpose of the boycott was to protest racial discrimination in city services and discriminatory employment practices by the merchants. The boycott involved instances of threats and violence similar to those in the instant case. A state court issued an injunction similar to that issued by the chancellor in this case. A federal district court refused to vacate or modify the state court injunction, but this Court reversed. The Court held that 28 U.S.C. 2283 did not bar federal relief and that the state injunction infringed First Amendment rights. The Court stated at 414 F.2d 290:

> The right to picket is not absolute. It must be "asserted within the limits of not unreasonably interfering with the rights of others to use the sidewalks and streets, to have access to store entrances, and where conducted in such manner as not to deprive the public of police and fire protection." Kelly v. Page, 5 Cir., 1964, 335 F.2d 114, 119. These interests can, of course, be protected by state injunctions narrowly

> drawn. The injunction here, however, has has not struck such a balance. It prohibits all picketing in the designated business areas of Greenwood, for whatever purpose and in whatever manner carried out. This overshoots the mark and the situation cannot be saved by Milk Wagon Drivers Union v. Meadowmoor Dairies, 1941, 312 U.S. 287, 61 S. Ct. 552, 85 L.Ed. 836, a case premised on violence of an intensity and duration in no way present here, or at least on the record before the district court.
>
> The injunction here in question goes even further than prohibiting protected picketing. It enjoins "loitering or congregating * * * to induce, persuade, or coerce any person or persons not to trade or to do other business with * * * Complainants.* * *" This, for aught else appearing, prohibits the distribution of leaflets or even speech directed toward the boycott effort.

The court remanded the case to the district court for further proceedings consistent with its opinion.

The Court's remarks are equally applicable here. Indeed, the need for an injunction in the instant case was even greater than in Machesky, in light of the large damage award made by the chancellor and the supersedeas bond requirement for the state court appeal. Moreover, in the instant case, the district court's injunctions are to be effective only during the state court appellate process.

2. Plaintiffs-appellees would have suffered irreparable injury if a preliminary injunction had not been granted.

The district court found that

> plaintiffs will suffer immediate and irreparable harm if the enforcement of the state decree by defendants is not enjoined. To comply with the provisions of the decree enjoining protected rights will seriously impair their rights to free speech and association. This is in and of itself an irreparable injury. Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). While the record reflects that plaintiff NAACP can obtain funds to finance the procurement of a supersedeas bond, to accomplish this NAACP will be required to borrow a substantial portion of the amount of the bond and to deplete funds necessary to conduct its normal operations. To repay these sizeable loans the NAACP will have to curtail practically all of its usual functions during the pendency of appeal, shown to be a period of two or three years. Many current projects will have to be terminated and new projects cannot be commenced (R 826; A 393).

These findings are fully supported by affidavits of NAACP officials and others presented by plaintiffs-appellees filed

in support of their motion for a preliminary injunction.[17/] These findings are, in our view, sufficient to establish that plaintiffs-appellees would have suffered irreparable harm had the injunctions not issued.

17/ For example, Margaret Bush Wilson, Chairman of the National Board of Directors of the NAACP, stated in her affidavit that "the injunction imposed on constitutionally protected activities of the NAACP and its members by the Hinds County Court Decree, and the joint and several judgment of $1,250,699.00, aimed at the NAACP and individuals, most if not all of whom are NAACP members, has an undeniable chilling effect that severely impairs the ability of the NAACP and individuals acting through it, to carry out the objective [of the organization]" (R 349; A 122-123). Roy Wilkins, Executive Director of the NAACP, averred in his affidavit that "if the NAACP is required to post a bond, it would have a severe and adverse impact on the ability of the organization to carry forward its regular and essential First Amendment activities" (R 792; A 369). Gloster B. Current, Administrator of the NAACP, stated in his affidavit that "[i]f all of the unrestricted assets were seized to pay the state chancery court judgment, the NAACP would be unable to continue functioning. It would have little if any funds to pay its current operating expenses, and its creditors would cease providing essential services on a credit basis" (R 360; A 125). And Clarence Mitchell, Director of the Washington Bureau of the NAACP, said in his affidavit that "[o]ur work would virtually terminate if the NAACP assets were seized by levy because of the [chancellor's] judgment.... A heavy encumbrance on the Treasury of the Association as a result of the borrowing necessary to post a bond to stave off a seizure of assets would likewise significantly reduce the capacity of the Washington Bureau to carry out [its] duties ..." (R 399; A 137).

3. The injunctions do not substantially harm other interested parties.

The only harm the merchants will suffer as a result of the injunctions is a delay in receiving the damages if they are successful in the state court appeal. The chancellor, however, ordered that the damages will bear interest from the date of his final decree (R 506; A 213). There is nothing in the record to indicate that the state court defendants' failure to post a supersedeas bond would adversely affect the merchants' ultimate ability to collect on their judgment, should it be affirmed on appeal. There is no suggestion that the NAACP's assets will dissipate pending that appeal. Rather, the record shows that, as a result of a nation-wide fund raising drive, the NAACP's assets have significantly increased as a result of the chancellor's decree. Accordingly, the merchants will suffer no substantial harm as a result of the October 20, 1976, injunctions, even if they should prevail on appeal in the chancery court action.

4. Granting the injunctions was in the public interest.

Plaintiffs-appellees in this action seek to vindicate their First Amendment right to free speech -- one of the cornerstones of our democracy. Moreover, in exercising this right in Port Gibson, plaintiffs-appellees were seeking equal rights for black Americans, an important national goal. The NAACP, whose continued existence is jeopardized by the chancellor's decree, has for many years been a leading advocate for the constitutional and civil rights of black Americans. It has done so by non-violent means -- by promoting the use of the ballot box, the legal system peaceful speech, and education. For these reasons, the issuance of the October 20th preliminary injunctions was in the public interest.

B. The District Court Properly Asserted Jurisdiction Over This Case.

1. The court's orders were not precluded by the anti-injunction statute, 28 U.S.C. 2283.

28 U.S.C. 2283 provides as follows:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The underlying purpose of section 2283 is "to prevent needless friction between state and federal courts." Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4, 9 (1939). Section 2283 is to be strictly applied. Amalgamated Clothing Workers v. Richman Bros. Co., 348 U.S. 511, 515-516 (1955); Carter v. Ogden Corp., 524 F.2d 74 (5th Cir. 1975). Unless one of the three exceptions listed in the statute is applicable, it constitutes an absolute ban upon a federal court injunction against a pending state court proceeding. Vendo Co. v. Lektro-Vend Corp., Supreme Court No. 76-156, decided June 29, 1977 (slip. op. p. 5) (plurality opinion); Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 287 (1970).

The district court ruled that section 2283 did not foreclose the issuance of an injunction. It observed that "[t]he injunctive relief requested does not contemplate interference with the proceedings in the state court. The relief requested applies to the enforcement of the judgment by the individual state court complainants and extends only for that period necessary to permit an exhaustion of appellate remedies" (R 820; A 389). The court also found that "any attempt by the state court complainants to enforce the decree of the state court and require the defendant banks to comply therewith would be a violation of this court's injunctive order of December 15, 1969. In order to protect and effectuate this court's said judgment the motion for preliminary injunction as regards said funds must be sustained ..." (ibid.).

The district court's rulings as to the applicability of section 2283, in our view, were correct. The court's orders do not attempt "to stay proceedings in a State court." Rather, the orders prohibit only the enforcement of a state court judgment by private parties, pending the appeal of that judgment. In Wells Fargo & Co. v. Taylor, 254 U.S. 175, 186 (1920), the Supreme Court held that a federal suit to enjoin a party from collecting a state court judgment was "not one to stay proceedings in a state court in the sense of § 265" [a predecessor

of section 2283]. And in Di Giorgio v. Causey, supra, this Court sustained a federal preliminary injunction against enforcement of a state court judgment. See also Simon v. Southern Railway, 236 U.S. 115 (1915). Since the October 20th orders are to remain effective only during the state court appellate process, they cause no more "interference" with the state appeal than would the posting of the supersedeas bond. And the chancellor's final decree ordering the banks to pay the funds to the merchants was in direct conflict with the district court's prior order of December 15, 1969, which prohibited the merchants from exercising any control over the funds. The district court's October 20th injunctions were therefore necessary to "protect or effectuate" its previous injunction of December 15, 1969. Cf. International Ass'n of Mach. & Aero. Wkrs. v. Nix, 512 F.2d 125 (5th Cir. 1975); Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir. 1973). Moreover, there is another reason why section 2283 did not bar the injunctions. Plaintiffs' supplemental complaint, filed October 1, 1976, alleges that the chancellor's final decree violates 42 U.S.C. 1983. The Supreme Court held in Mitchum v. Foster, 407 U.S. 225 (1972), that 42 U.S.C. 1983 is an Act of Congress "expressly authoriz[ing]" a federal injunction

of state court proceedings. This Court has also so held. See, e.g., Joiner v. City of Dallas, Texas, 488 F.2d 519, 520 (1974); American Radio Ass'n v. Mobile Steamship Ass'n, Inc., 483 F.2d 1, 6 (1973); Palaio v. McAuliffe, 466 F.2d 1230, 1232 n. 7 (1972). Because this suit arises under 42 U.S.C. 1983, the anti-injunction statute did not bar the October 20, 1976, injunctions.

Defendants-appellants contend that the December 15, 1969, injunction was never effective because plaintiffs-appellees failed to post the bond required by paragraph 3 of the injunction (Br. pp. 53-54). That paragraph required the banks "to release all funds held by them pursuant to the writs of attachment ... upon posting by plaintiffs ... of a bond in the amount of 110% of [the] funds." Paragraph 5 of that injunction further enjoined the merchants "from subjecting or causing to be subjected in any way funds of [the] plaintiffs deposited in the defendant banks to attachment or other process causing [the] plaintiffs to be deprived of the use of their funds." Paragraph 5 did not contain any bond requirement.

It appears that the bond required by paragraph 3 was never posted and that some, but not all, of the funds have been withdrawn from the banks.

The failure to post the bond required by paragraph 3 of the December 15, 1969, injunction, however, does not render the entire injunction ineffective. The injunction required a bond only as a prerequisite to the banks' releasing the funds to the plaintiffs. The paragraph of the injunction that prohibited the merchants from exercising any control over the funds was not conditioned upon the posting of a bond. Therefore, even assuming that paragraph 3 of the injunction was never effective, paragraph 5 was valid and precluded the merchants from proceeding with the attachment of the funds. The posting of a bond is not a necessary prerequisite for an effective injunction. Despite the apparently mandatory language of Rule 65(c), F.R. Civ. P., that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant," the question whether to require security is within the discretion of the trial court. Clarkson Co., Ltd. v. Shaheen, 544 F.2d 624, 632 (2d Cir. 1976), and cases cited therein.

Defendants-appellants rest their argument upon United States v. Associated Air Transport, Inc., 256 F.2d 857 (5th Cir. 1958). In that case the Court held that an injunction expressly conditioned upon the posting of bonds became appealable only when the bonds were posted. But in that case the entire order was conditioned upon the

posting of the bonds. Here only paragraph 3 was conditional. Paragraph 5, directed at the merchants, was unconditional and became effective upon issuance of the injunction. Defendants-appellants' reliance upon Associated Air Transport is therefore misplaced.

In any event, "the order ... requir[ing] the making of bond could not be void because of a subsequent failure to make it ...." Orleans Parish School Board v. Bush, 252 F.2d 253, 255 (5th Cir.), cert. denied, 356 U.S. 969 (1958). Thus the district court was entitled under section 2283 to issue an injunction to protect and effectuate its valid December 15, 1969, order, notwithstanding plaintiffs-appellants' failure to post the bond required by paragraph 3 of the order.

Defendants-appellants never appealed the issuance of the December 15, 1969, injunction, nor did they file a motion in the district court to dissolve the injunction on the ground that no bond had been posted. They did not raise the failure to post the bond as an issue until October 1976, almost eight years after the issuance of the injunction. In its earlier opinion in this case this Court took pains "to notify the parties that the December 15 interlocutory injunction against the attachments remains standing" (444 F.2d at 1306), noting that "[n]either party to this appeal has suggested that the interlocutory injunction of June 9, 1970 ... superseded in any way the interlocutory injunction

of December 13 [sic], 1969 ..." (ibid., n. 9). In these circumstances, defendants-appellants have waived their right to challenge the 1969 injunction on the ground that the required bond was not posted. Cf. Orleans Parish School Board v. Bush, supra, 252 F.2d at 256. That injunction remains effective, and the October 20, 1976, orders against enforcement of the chancellor's final decree were necessary to protect and effectuate it.

2. The orders were not precluded by the doctrine of Younger v. Harris.

Defendants-appellants further contend (Br. pp. 36-42) that the October 20th injunctions were barred by the doctrine articulated in Younger v. Harris, 401 U.S. 37 (1971). Younger held that when a state criminal proceeding under a disputed state criminal statute is pending against a federal plaintiff at the time his federal complaint is filed, unless bad-faith enforcement or other special circumstances are demonstrated, principles of equity, comity, and federalism preclude issuance of a federal injunction restraining enforcement of the state criminal statute. The Supreme Court has recently extended the Younger doctrine to state civil enforcement proceedings brought by state officials. Trainor v. Hernandez, No. 75-1407, decided May 31, 1977 (attachment process); Juidice v. Vail, No. 75-1397, decided Mar. 22, 1977 (contempt proceeding); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (public nuisance proceeding). In addition, this Circuit has applied the Younger rule in civil proceedings by state officials that were in aid of and closely related to the enforcement of state criminal statutes. Duke v. State of Texas, 477 F.2d 244 (1973), cert. denied, 415 U.S. 978 (1974); Palaio v. McAuliffe, supra.

We recognize that "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." Younger, supra, 401 U.S. at 45. The unusual circumstances of this case, however, fully justify the issuance of the October 20th injunctions.

The district court did not address the applicability of Younger to the instant case. In our view there are several reasons why Younger did not preclude the October 20th injunctions. First, the chancery court action is a civil suit between private parties which is not in aid of or closely related to state criminal proceedings. Neither the Supreme Court nor this Circuit has applied the Younger rationale in a case such as this. The "principles of federalism" upon which Younger was partially based are not as significant where the state is not a party in the action to be enjoined. State interests are more directly involved in those cases in which the state is a party. Cf. Hobbs v. Thompson, 448 F.2d 456, 466 (5th Cir. 1971).[18] Second, the October 20th

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18/ The Supreme Court commented in Trainor v. Hernandez, supra: "As in Juidice v. Vail, _____ U.S. _____, _____ n. 13 (1977), we have no occasion to decide whether Younger principles apply to all civil litigation" (slip op. p. 11 n. 8).

injunctions did not enjoin the state court proceedings. Rather, the injunctions are intended to prohibit only the enforcement of the chancellor's final decree by the merchants pending the appellate process in that case. Thus, one of Younger's essential elements -- an attempt to enjoin a state court decisional process -- is missing here. Cf. Gerstein v. Pugh, 420 U.S. 103, 108 n. 9 (1975). Finally, even if the Younger rule applies, it does not prohibit the granting of the preliminary injunction. The Court in Younger recognized that the policy against federal interference with state prosecutions must yield if irreparable injury is "both great and immediate" (401 U.S. at 46) and that "unusual situations calling for federal intervention might ... arise" (id. at 54).

As indicated above, p. 31 supra, the district court found that, to post the supersedeas bond needed to protect its assets, the NAACP would "have to curtail practically all of its usual functions during the pendency of the appeal" and that "[m]any current projects [would] have to be terminated and new projects [could] not be commenced." These findings are fully supported by the record and are sufficient to

demonstrate that plaintiffs-appellees would have suffered "both great and immediate" irreparable harm had the court not issued the injunctions.[19/]

In their brief, defendants-appellants do not even mention that the chancellor awarded damages of $1,250,699.00 and that the NAACP was required to post a supersedeas bond of $1,563,373.75 in order to prevent seizure of its assets pending the appeal of that judgment. Their argument totally ignores the irreparable injury the NAACP and the other state court defendants will suffer if required to post a bond of such magnitude simply to be able effectively to exercise their right to appeal.

19/ The Supreme Court acknowledged that financial hardship may satisfy the "irreparable injury" exception to the Younger rule in Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). In that case the Court stated (422 U.S. at 932): "[R]espondents alleged ... that absent preliminary relief they would suffer a substantial loss of business and perhaps even bankruptcy. Certainly the latter type of injury sufficiently meets the standards for granting interim relief, for otherwise a favorable final judgment might well be useless."

3. The chancery court did not have exclusive in rem jurisdiction over the bank accounts.

Defendants-appellants contend that the chancery court had exclusive jurisdiction over the bank accounts, because of the rule that a court which first obtains in rem jurisdiction over a res holds it to the exclusion of other courts until its duty is fully performed and its jurisdiction exhausted (Br. pp. 48-50). See, e.g., Princess Lida v. Thompson, 305 U.S. 456, 466 (1939); Kline v. Burke Constr. Co., 260 U.S. 226, 229 (1922); Palmer v. Texas, 212 U.S. 118, 125 (1909); PPG Industries, Inc. v. Continental Oil Co., 478 F.2d 674 (5th Cir. 1973); Smith v. Humble Oil and Refining Co., 425 F.2d 1287 (5th Cir. 1970). They contend that "the federal district court was therefore without any jurisdiction" (Br. p. 50).

First, this argument ignores the fact that the district court's jurisdiction over the supplemental complaint does not depend solely upon the attachment of the bank accounts. Rather, the gist of that complaint is that enforcement of the chancellor's final decree of August 19, 1976, would violate the First and Fourteenth Amendments and 42 U.S.C. 1983. As explained above (pp. 23-28), this allegation in and of itself states a cause of action, regardless of the existence of the bank accounts.

Second, this argument is inconsistent with the previous opinion of this Court in this case, in which the Court, in stating that the December 15, 1969, injunction remained

effective, implicitly recognized that the district court had jurisdiction to exercise control over the bank accounts.

Third, the state court action was an in personam, not an in rem proceeding. Cf. PPG Industries, Inc. v. Continental Oil Co., supra. That action was directed against persons and organizations and sought personal judgments. The bank accounts were not the direct object of the action, but rather were attached as a means of satisfying any judgment later rendered by the court. The attachment of the bank accounts did not change the nature of the underlying action from in personam to in rem. This principle was recognized by the Second Circuit in Lankenau v. Coggeshall & Hicks, 350 F.2d 61 (1965).[20/] In circumstances similar to those of the instant case, the court stated:

> Since the res was not the basis of the state court's jurisdiction, the case presents no such problem as might arise in that event. Here the property stood only as security for a possible judgment....
>
> [T]he prior attachment for security purposes in the State court action does not give that court exclusive jurisdiction over the property attached. 350 F.2d at 64, 67.

20/ Lankenau reversed Securities and Exchange Commission v. Brown, 235 F. Supp. 57 (S.D. N.Y. 1964), which defendants-appellants rely upon in their brief (pp. 49-50) and miscite as 255 F. Supp. 57.

Accordingly, the chancery court did not have exclusive jurisdiction over the bank accounts which deprived the district court of its jurisdiction to entertain the original and supplemental complaints.[21/]

4. Dismissal of the amended complaint of December 15, 1969, did not preclude the district court from exercising jurisdiction over the supplemental complaint of October 1, 1976.

Defendants-appellants also advance the argument (Br. pp. 50-52) that the amended complaint of December 15, 1969,[22/] superseded the original complaint of November 7, 1969; that the amended complaint was thereafter dismissed by this Court; and that therefore "[t]he plaintiffs on October 1, 1976, could not amend and supplement pleadings that ceased to exist more than six years before."

Even if the subsequently dismissed amended complaint did supersede the original complaint, it does not follow that the issuance of the October 20, 1976, injunctions should be reversed. In Loux v. Rhay, 375 F.2d 55 (9th Cir.

21/ This Court's recent decision in Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84 (1977), suggests yet another jurisdictional basis. Insofar as the instant case seeks enforcement of the district court's previous injunction of December 15, 1969, it is "supplemental" or "ancillary" to the original case. See 546 F.2d at 90. To effectuate its prior injunction, then, the district court had jurisdiction over the supplemental complaint filed October 1, 1976.

22/ Defendants-appellants state (Br. p. 51) that the amended complaint was filed on December 11, 1969; the docket sheet, however, indicates that that complaint was filed December 15, 1969.

1967), for example, the court permitted the filing of an "amended complaint" after dismissal of the original complaint. Defendants-appellants have suggested no prejudice resulting from the filing of the supplemental complaint. They are in the same position they would have been in had plaintiffs-appellees "instead filed precisely the same pleading as an initial complaint in a new action. To require [plaintiffs-appellees] to commence a new and separate action in these circumstances would have been to insist upon an empty formalism." United States v. Reiten, 313 F.2d 673, 675 (9th Cir. 1963).

It is true, as defendants-appellants contend (Br. p. 51), that an amended complaint ordinarily supersedes an original complaint. See, e.g., Ciccetti v. Lucey, 514 F.2d 362, 365 n. 5 (1st Cir. 1975); Cedillo v. Standard Oil Company of Texas, 261 F.2d 443 (5th Cir. 1958); Bullen v. De Bretteville, 239 F.2d 824, 833 (9th Cir. 1956), cert. denied sub nom. Treasure Co. v. Bullen, 353 U.S. 947 (1957); 3 Moore's Federal Practice ¶15.08[7]. This general rule does admit of exceptions, however. See, e.g., Nuelsen v. Sorensen, 293 F.2d 454, 458 (9th Cir. 1961); United States v. Templeton, 199 F. Supp. 179, 181 (E.D. Tenn. 1961). In our view, the particular circumstances of this case warrant the conclusion that the filing of the amended complaint of December 15, 1969, did not supersede the original complaint of November 7, 1969.

The December 15, 1969, preliminary injunction, which enjoined the attachment of the bank accounts, was issued on

the basis of the original complaint.[23/] The issuance of this injunction was never appealed, and this Court clearly indicated in the appeal of the June 9, 1970, injunction that the December 15, 1969, injunction would remain effective despite its order for the dismissal of the amended complaint. In these circumstances, this Court must have viewed the amended complaint as supplemental to the original complaint. Otherwise, after the dismissal of the amended complaint, there would have been no complaint remaining in the case to serve as a basis for the continuing December 15 injunction. It was therefore appropriate for the district court to allow the filing of the "supplemental and amended verified complaint" on October 1, 1976, as supplemental to the original complaint. An application to file a supplemental complaint under Rule 15(a), F.R. Civ. P., like an application for leave to file an amended complaint, is within the discretion of the trial court, and should be freely granted where doing so is in the interest of justice. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971); Foman v. Davis, 371 U.S. 178, 182 (1962); Dunn v. Koehring Co., 546 F.2d 1193, 1198 (5th Cir. 1977); New Amsterdam Casualty Co. v. Waller, 323 F.2d 20 (4th Cir. 1963), cert. denied, 376 U.S. 963; United States v. Reiten, supra; Cherry v. Morgan, 267 F.2d 305 (5th Cir. 1959). The district court therefore properly allowed the filing of the supplemental complaint on October 1, 1976.

23/ Although the amended complaint was lodged with the clerk on December 15, 1969 (see note 22, supra), the trial court did not authorize the filing of that complaint until June 9, 1970, at the time it issued its second preliminary injunction (R 232).

II

THE DISTRICT COURT PROPERLY ENJOINED THE ENFORCEMENT OF THE STATE COURT DECREE AGAINST "HEADSTART" FUNDS, AND PROPERTY PURCHASED WITH SUCH FUNDS, ADVANCED TO MAP BY THE UNITED STATES

It is undisputed that the assets of Mississippi Action for Progress consist almost entirely of funds provided to MAP by the United States through "Project Headstart" and property purchased with such funds. The Headstart-Follow Through Act, 42 U.S.C. 2921, et seq. (Supp. V, 1975), the implementing regulations promulgated by the Secretary of Health, Education, and Welfare, 45 C.F.R. Parts 74, 1301-1302, 1305 (1976), and the Headstart grant agreements between MAP and the United States clearly support the district court's conclusion that the United States has an equitable lien upon all federal Headstart funds, and property purchased with such funds. The Government has not consented to this lien being interfered with by the state court judgment lien here. Indeed, the Act requires that MAP's Headstart funds and property be used exclusively for the statutory purposes specified by Congress, namely, "the effective delivery of comprehensive health, educational, nutritional, social, and other services to economically disadvantaged children and their families" (42 U.S.C. 2922).

Therefore, the district court properly enjoined defendants-appellants "from subjecting, in any way, such funds and property to the satisfaction of the state court's monetary awards" (R 822; A 390). The injunction is necessary to protect the Government's prior lien interest in the Headstart funds advanced to MAP. Moreover, the injunction is necessary in the public interest, to ensure that the statutory goals are satisfied and that 4,950 children in 20 Mississippi counties will continue to receive the benefits of the Headstart program during the course of the state court litigation.

A. The Equitable Lien of the United States.

1. The statutory and regulatory scheme of Project Headstart. As part of its effort "to eliminate the paradox of poverty in the midst of plenty in this Nation" (42 U.S.C. 2701), Congress, in 1964, authorized "Project Headstart," which was designed to provide comprehensive health, nutritional, educational, social, and other services to children of low-income families who had not reached the age of compulsory school attendance. Under "Project Headstart," originally the Office of Economic Opportunity, and after 1969 the Department of Health, Education, and Welfare, have provided

financial assistance to public and private nonprofit agencies to carry on local health, nutritional, educational, social, and other services for disadvantaged pre-school children. MAP, a nonprofit corporation organized under the laws of Mississippi, has received such financial assistance since its inception in 1966, for the purpose of carrying out a Headstart program for 4,950 children in 20 Mississippi counties (Affidavit of John J. Jordan, p. 2; R 727; A 343).

"In recognition of the role which Project Headstart has played in the effective delivery of comprehensive health, educational, nutritional, social, and other services to economically disadvantaged children and their families" (42 U.S.C. 2922), Congress enacted the Headstart-Follow Through Act in 1975, extending the authority for the appropriation of federal funds for that project. Under the Act, the Secretary of Health, Education, and Welfare may, upon application by an eligible organization, provide financial assistance for the operation of Headstart programs.[24/] Specifically, Congress authorized the use of such federal funds

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24/ Under the Act, federal financial assistance may not exceed 80% of the approved costs of the assisted Headstart program (42 U.S.C. 2928b(b)). The remaining 20% of the costs must be furnished by the grantee (ibid.).

> for the planning, conduct, administration, and evaluation of a Headstart program focused primarily upon children from low-income families who have not reached the age of compulsory school attendance which (1) will provide such comprehensive health, nutritional, educational, social, and other services as will aid the children to attain their full potential, and (2) will provide for direct participation of the parents of such children in the development, conduct, and overall program direction at the local level. 42 U.S.C. 2928.

Although private nonprofit Headstart organizations such as MAP are independent contractors and not federal agencies,[25/] the Secretary of Health, Education, and Welfare has adopted numerous regulations and guidelines to guarantee that the federal funds received by these organizations are spent only for the purposes specified in the Act. Thus, 45 C.F.R. 1301.3-1 provides that the principles governing the administration of grants set forth in 45 C.F.R. Part 74 apply to Headstart grants, and Appendix F to 45 C.F.R. Part 74, which deals with grants to nonprofit organizations such

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25/ See United States v. Orleans, 425 U.S. 807 (1976); Hines v. Cenla Community Action Comm., Inc., 474 F.2d 1052, 1058 (5th Cir. 1973). Pursuant to 45 C.F.R. 1301.3-2, private nonprofit grantees must purchase adequate student accident insurance, liability insurance for accidents on the grantee's premises, and transportation liability insurance. Officials authorized to sign checks or disburse cash must be bonded.

as MAP, restricts the use of grant funds to "allowable" costs -- that is, those reasonable costs "incurred specifically for the grant/contract" (Section B.4(a)). "Unallowable costs" -- which include costs "resulting from violations of, or failure of the institution to comply with, Federal, State, and local laws and regulations" and costs for "liabilities to third persons and any other loss or damage not compensated by insurance or otherwise" (Sections G.14, G.17(b)) -- "are not reimbursable as a charge to a DHEW grant/contract" (Section C.2).[26/]

26/ The substance of these regulations is contained in the form of guidelines published in the "Grants Administration Manual" of the Office of Human Development, Department of Health, Education, and Welfare. In addition, the grant awards themselves state:

> Federal funds as shown in Column (3), Line A, are hereby obligated for the program proposed by the grantee as noted above and in the attachments to this statement. Program account budgets may be modified by the grantee only under general flexibility guidelines or in accordance with written HEW approval. This grant is also subject to the applicable general conditions governing grants under Title II or IIB of the Economic Opportunity Act of 1964 as amended and Regulations of the Office of Economic Opportunity and the Department of Health, Education, and Welfare. (Emphasis added.) (Attachment "A" to Jordan Affidavit; R 730; A 83 (Exh. Vol.).)

The regulations and guidelines reach not only the expenditure of grant funds, but also the use of personal property purchased with such funds.[27/] Although title to nonexpendable personal property purchased in whole or in part by Headstart funds vests in the grantee, the grantee may use the property only "in the original grant project ... to accomplish the purpose of the project" (45 C.F.R. 74.134(b)(1)). "When there is no longer a need for the property to accomplish the purpose of the original project, the grantee shall use the property in connection with other Federal awards it has received ..." (id. at (b)(2)). If the grantee cannot use the property in connection with any other federal awards, and the property costs more than $500 and is less than four years old, the grantee may retain the property for its own official use "[p]rovided, [t]hat a fair compensation is made to the Federal Government for the Federal share of the property" (id. at (b)(3)). If the grantee cannot put the property to any official use, it must sell the property "and reimburse the Federal Government" to the extent of federal participation in the project concerned, or follow

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27/ Headstart funds may not be used for the purchase of real property (Jordan Affidavit, p. 3 n. 1; R 728; A 344; "Grants Administration Manual," Ch. 7.5(i)).

disposition instructions from the Government (id. at (c)). Similarly, expendable personal property may be purchased and used "only to the extent that the supplies or materials are reasonably necessary to carry out the grant-supported project or program" (45 C.F.R. 74.137(a)). If such property has a useful life longer than the period of need on the project or program concerned, and cannot be used in connection with other federal projects, the grantee may retain it, but "compensation to the granting agency shall be required if the aggregate fair market value of all such items acquired under the same grant exceeds $500" (id. at (b)).

Finally, all Headstart grantees must account for their use of federal funds. The regulations require each grantee to submit to an annual independent audit to determine, among other things, "whether the agency is complying with the terms and conditions of the grant, including the applicable laws, regulations and directives" (45 C.F.R. 1301.3-3(a)). The grantee must also submit "a separate annual report of expenditures made for the development and administration of its Head Start program during the previous budget period" (45 C.F.R. 1301.5-6(a)). If it is determined that grant funds have been expended for improper purposes, the grants may be suspended or terminated (45 C.F.R. 74.113, 74.114).

2. Creation of the lien. The effect of the elaborate statutory and regulatory scheme described above is to create an equitable lien in favor of the United States upon all federal funds advanced to Headstart grantees, as well as upon all property purchased with such funds.

"'The essential elements of equitable liens include (1) a debt, duty or obligation owing by one person to another, ... and (2) a res to which that obligation fastens, which can be identified or described with reasonable certainty.'" Avco Delta Corp. Canada Ltd. v. United States, 484 F.2d 692, 703 (7th Cir. 1973), cert. denied, 415 U.S. 931 (1974). An equitable lien "'may be created by express contract which shows an intention to charge some particular property with a debt or obligation, or it may arise by implication from the relations and dealings of the parties whose interests are involved.'" Morrison Flying Service v. Deming Nat'l Bank, 404 F.2d 856, 861 (10th Cir. 1968), cert. denied, 393 U.S. 1020 (1969). Accord, Citizens Co-Op Gin v. United States, 427 F.2d 692, 695 (5th Cir. 1970); Caldwell v. Armstrong, 342 F.2d 485, 490 (10th Cir. 1965).

The statutory and regulatory scheme of Project Headstart establishes that MAP owes an "obligation" to the federal government, which "fastens" to the Headstart funds "identified or described" in the federal grant awards, to use such funds only for purposes specified by the federal government. This obligation is enforced by a federal monitoring system, and

continues throughout the life of each grant. The federal government's interest is both continuing and reversionary, since the regulations provide that all Headstart property must revert to the Government in cash or kind, once the grantee has finished using it. Consequently, all the requirements for the creation of an equitable lien in favor of the United States upon Headstart funds and property are satisfied. As the district court said: "The United States has a full and complete lien interest in all funds and property purchased by MAP with funds advanced by HEW" (R 822; A 390).

3. Protection of the lien. The threat to the Government's equitable lien in MAP's Headstart funds and property was first posed on August 19, 1976, when the chancery court entered a final decree holding MAP and the other state court defendants jointly and severally liable to the state court plaintiffs in the amount of $1.25 million. The threat was realized when the chancery court, on September 30, 1976, denied the state court defendants' prayers for a supersedeas of the final decree without bond. This action by the chancery court meant that the state court defendants could proceed to execute upon the judgment lien created by the final decree, and could move against MAP's Headstart funds and property.[28/]

28/ The state court defendants did not need to obtain supersedeas in order to perfect their appeal. Mississippi law permits an appeal with or without supersedeas. However, unless the defendants obtained supersedeas, the state court plaintiffs could execute immediately upon defendants' assets in satisfaction of the state court judgment.

The United States properly intervened in the federal district court to protect its equitable lien in MAP's Headstart funds and property. The "general rule," established by decisions of the Supreme Court, is "that the United States may sue to protect its interests." Wyandotte Transp. Co. v. United States, 389 U.S. 191, 201 (1967). Here, the United States had two grounds upon which to obtain injunctive relief.

First, as the district court held, the interest of the United States in MAP's Headstart funds and property may not be subjected to the judicial processes of the Mississippi state courts without the consent of the United States, Maricopa County v. Valley National Bank, 318 U.S. 357, 362 (1943); United States v. Alabama, 313 U.S. 274, 281 (1941), even if that interest is only equitable in nature, Blake Construction Co. v. American Vocational Ass'n Inc., 419 F.2d 308 (D.C. Cir. 1969). Here, far from the United States having granted its consent, the use of federal funds to pay state court judgments flatly contradicts the Congressional authorization in 42 U.S.C. 2928 that such funds be used "for the planning, conduct, administration, and evaluation of a Headstart program ...." 42 U.S.C. 2928. Therefore, the United States was entitled to an injunction prohibiting the state court plaintiffs from invoking those state judicial processes against the Government's equitable lien.

Second, even if the Government had consented to being subjected to the state judicial processes, the Government is entitled to priority over the state judgment lien on all of MAP's Headstart funds and property deriving from grants made prior to the final decree of the chancery court. This is because "the priority of liens is determined by the principle 'first in time, first in right'" (Meyer v. United States, 375 U.S. 233, 236 (1963)).[29/] The United States consequently was, at the very least, entitled to an injunction prohibiting the state court defendants from interfering with that prior lien.[30/]

29/ In suits brought by the United States under 28 U.S.C. 1345 (1970), such as the present intervention, the Erie doctrine does not apply, and federal law controls. E.g., United States v. Nationwide Mutual Ins. Co., 499 F.2d 1355 (9th Cir. 1974). We note, however, that Mississippi recognizes the common law rule of "first in time, first in right." Mendrop v. Harrell, 233 Miss. 679, 103 So.2d 418 (1958).

30/ The United States was not required to record its lien in order for it to be valid against the state court plaintiffs' judgment lien. United States v. Allegheny, 322 U.S. 174 (1944); In Re Double H Products Corp., 462 F.2d 52 (3rd Cir. 1972).

B. The Public Interest.

As noted above, p. 17 supra, we are dealing with the question of whether the district court abused its discretion in entering a preliminary injunction. Consequently, consideration of the public interest is clearly relevant. The Government and the public have a special interest in the uninterrupted provision of needed health, nutritional, educational, social, and other services to the 4,950 children in 20 Mississippi counties served by MAP.

As the Government demonstrated below without contest, seizure of MAP's Headstart funds and property would effectively kill MAP and cause incalculable harm to the children who benefit from MAP's programs (Jordan Affidavit, p. 4; R. 729; A 345). MAP would be unable to meet its payroll, purchase supplies, or pay utilities; 1,013 employees would be out of work, 4,950 children could not be fed, and facilities could not be maintained. Many low-income parents who were able to work because their children were in Headstart programs would be forced to leave their jobs and remain home. Medical, dental, and other services vital to the well being of the children would cease. Vendors and others doing business with MAP would suffer. It could take a year or longer to reestablish services through a new Headstart grantee.

Clearly, execution upon the final decree of the chancery court would frustrate "the policy of the United States to eliminate the paradox of poverty in the midst of plenty in

this Nation by opening to everyone the opportunity for education and training, the opportunity to work, and the opportunity to live in decency and dignity" (42 U.S.C. 2701). Since the grant of preliminary injunctive relief depends, in part, upon consideration of the public interest and harm to third parties, the grant of a preliminary injunction below was particularly appropriate. The final decree of the chancery court may well be reversed on appeal, and the irreparable injury to the public interest and to third parties which would be caused by execution upon MAP's Headstart funds and property during the pendency of the appeal far outweighs whatever interest the state court plaintiffs may have in obtaining immediate satisfaction of their money judgment.

Accordingly, the district court's grant of preliminary injunctive relief to the United States should be affirmed.

C. The United States' Intervention Was Timely.

Defendants-appellants argue that the United States "failed to timely file its motion for intervention because the state court lawsuit, which had been filed in 1969, had been in progress for approximately seven years and completed" (Br. p. 55). This argument is utterly baseless.

Unlike the other state court defendants, MAP did not seek relief in federal district court from the original writs of attachment issued in 1969, for the simple reason that none of MAP's assets had been attached. MAP, as a resident of Mississippi, was not subject to the Mississippi non-resident attachment procedure. Accordingly, throughout the chancery court litigation

MAP's assets were not threatened, and neither was the government's equitable lien in those assets.

The threat against MAP's assets, and the Government's equitable lien, was realized for the first time on September 30, 1976, when the chancery court denied the state court defendants' prayers for supersedeas without bond. The Government speedily moved to intervene in the district court in order to protect its interests on October 7, 1976 (R 715-752; A 336-346), only seven days after the denial of the prayers for supersedeas without bond and the recommencement of the proceedings below by the other state court defendants. Plainly, the Government's intervention was timely.

CONCLUSION

The district court's injunctive orders of October 20, 1976, should be affirmed.

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