IN THE

Supreme Court of the United States

OCTOBER TERM, 1925—No. 10.

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA.

PETITION FOR REHEARING.

Plaintiff-in-error petitions for a rehearing of her cause upon the following ground:

That in dismissing her cause "for want of jurisdiction upon the authority of Section 237 of the Judicial Code as amended by the Act of September 6, 1916, c. 448, sec. 2, 39 Stat., 726," this court acted under a misapprehension of the facts and

erroneously doubted the accuracy of the statement contained in the order (Record, page 337) of the District Court of Appeal, First Appellate District, Division 1, of the State of California, dated December 9, 1924, which said order was part of the record of said cause in this court, and which amended the record by inserting therein the following statement:

> "The question whether the California Criminal Syndicalism Act (Statutes 1919, page 281) and its application in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property, without due process of law, and that all persons shall be accorded the equal protection of the laws, was considered and passed upon by this Court."

This order and the stipulation upon which it was entered did not constitute an attempt to confer jurisdiction upon this court by consent. On the contrary, the stipulation and order stated the actual facts concerning the raising of the aforesaid Federal questions in the California District Court of Appeal, and the stipulation was entered into and the order was made for the purpose of enabling these actual facts to appear in the record.

The raising of these Federal questions in the District Court of Appeal is shown by the briefs submitted in that court in behalf of plaintiff-in-error. Copies of these briefs (omitting passages

which are wholly immaterial and italicizing those which are for the present purpose most important) are submitted herewith in an appendix separately printed, as Exhibits A, B and C, being respectively plaintiff-in-error's opening, closing and supplemental briefs submitted to that Court.

These briefs are submitted not as being in themselves parts of the record (which of course they are not [*Zadig* vs. *Baldwin,* 166 U. S., 485]), but as establishing the complete accuracy of the statement in the order—which *is* a part of the record—that the issues of Federal constitutional law were raised in the California District Court of Appeal and there decided against plaintiff-in-error. Counsel for plaintiff-in-error pressed these claims of Federal Constitutional right in the California District Court of Appeal even though "conscious of the fact that in passing upon an application for a writ of prohibition the Supreme Court of the State of California had rendered an opinion stating—'We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of the federal and state constitution.'" (See Appendix, page XXXI; the reference is to *Whitney* vs. *Superior Court,* 182 Cal., 114.)

(1) At page 19 of plaintiff-in-error's closing brief in the California District Court of Appeal (Exhibit B, page XXXII), appears the following:

> "Appellant respectfully urges that the Criminal Syndicalism Law of the State of

> California, as it stands, is violative of the Fourteenth Amendment to the Constitution of the United States."

(2) In the pages immediately following (see pages 19-28 of closing brief, Exhibit B, pages XXXII-XLVII) the statute's violation of the equal protection clause of the Fourteenth Amendment by reason of its unjust discrimination between those who oppose and those who favor change in industrial ownership is argued (with copious references to authorities—see especially quotations from the opinions in *American Sugar Refining Co.* vs. *MacFarland,* 229 Fed., 284, at page 25 of closing brief, Exh. B, page XLI and in *re VanHorn,* 70 Atl., 986, at page 26 of closing brief, Exh. B, page XLIV—where the equal protection clause of the Fourteenth Amendment is specifically mentioned).

(3) Continuing the claim of protection under the Fourteenth Amendment, plaintiff-in-error raised the specific constitutional objection of vagueness in the following words at page 28 of closing brief (Exhibit B, page XLVII):

> "Again the Statute is open to constitutional objection on the ground that its terms are vague and not susceptible of definition."

This necessarily raised a due process question (Compare *U. S.* vs. *Cohen Grocery Co.,* 255 U. S., 81, page 89; see also *International Harvester Co.* vs. *Kentucky,* 234 U. S., 216).

(4) Plaintiff-in-error's claim that the California Criminal Syndicalism Law violates the constitutional right of freedom of speech, assembly, etc., was made in her opening brief in the California District Court of Appeal (see pages 39-40, 2-3 of opening brief, Exh. A, pages XIX, II), and again in her closing brief (pages 17, 29 of closing brief, Exh. B, pages XXX, XLVIII). These rights are protected by the due process clause of the Fourteenth Amendment of the Constitution of the United States (*Gitlow* vs. *U. S.*, 45 Sup. Ct., 625).

This Court has held that a specific reference to the particular section of the Constitution which is violated is not necessary (*Clyde* vs. *Gilchrist*, 262 U. S., 94, 97), nor indeed any reference in terms to the Constitution of the United States provided the objection taken is by its very nature one arising under the Constitution of the United States (*Spencer* vs. *Merchant*, 125 U. S., 345, page 352). (That there is no need of formality in raising the Federal question, see *Murray* vs. *Charleston*, 96 U. S., 432, page 442.)

(5) The question of the violation of the most fundamental principles of due process by the conviction of plaintiff-in-error, without her or her counsel's being informed of the exact nature of the accusation against her and without protection against double jeopardy, was repeatedly raised (opening brief, pages 11-13, Exh. A, pages III-IV; pages 26-28, Exh. A, pages XVII-XVIII; pages 15-16, Exh. A, pages VII-VIII; page 23, Exh. A, page XIV; supplemental brief, pages 5-6, Exh. C, page LV). At page 12 of the opening

brief (Exh. A, page IV), specific reference is made to the *Constitutional* right of every accused to be informed of the nature of the accusation against him.*

This analysis shows not only that issues of Federal constitutional right were in fact urged upon the California court, but that these issues were urged with surprising insistence, vigor and variety of attack. As late as 1922 this court itself in a dictum (*Prudential Insurance Co.* vs. *Cheek*, 259 U. S., 530, 538) denied that freedom of speech was protected by the Fourteenth Amendment, a position only corrected in *Gitlow* vs. *New York* (45 Sup. Ct., 625, decided in 1925).

In the brief submitted by plaintiff-in-error in this Court all of these points were argued (Points I, V, VI, VII, VIII, IX) and additional arguments were adduced supporting plaintiff-in-error's contention that the statute as applied in her case violated the due process clause of the Fourteenth Amendment. Upon the authority of *Dewey* vs. *Des Moines* (173 U. S., 193, at page 198) parties are not confined to the same arguments advanced in the Courts below upon the federal questions involved.

The question whether the California Criminal Syndicalism Act and its application in this case violated the due process clause and the equal protection clause of the Fourteenth Amendment of

*Rights under the Federal Constitution were again urged by plaintiff-in-error in her unsuccessful application to the California Supreme Court to review the decision of the District Court of Appeal. Her petition to the California Supreme Court was in this regard identical—with the slightest verbal changes—with the closing brief in the District Court of Appeal attached hereto as Exhibit B.

the United States Constitution, having thus been raised by the briefs in the California District Court of Appeal, the order of that Court—which amended the record and was itself part of the record—shows conclusively that these Federal questions were not raised too late under the state practice and were passed upon by the state court (*Cincinnati Packet Co.* vs. *Bay,* 200 U. S., 179, page 182; compare *Miedreich* vs. *Lauenstein,* 232 U. S., 236). This order of the California District Court of Appeal—which, by reason of the refusal (Record, page 1) of the State Supreme Court to review the District Court's decision, became the court of last resort—was an order of the Court (see for the form, the judgment [Record, page 1] and the order allowing writ of error [page 11]; compare *Consolidated Turnpike Co.* vs. *Norfolk Railway Co.,* 228 U. S., 596, page 598).

The failure of Judge Richards in his opinion to mention any of the Federal questions thus presented to the California District Court of Appeal by plaintiff-in-error's briefs, is explained by the fact that the question of the constitutionality of the California Criminal Syndicalism Act both under the State and Federal Constitutions, had been determined adversely to plaintiff-in-error upon her previous application for a writ of prohibition which was denied by the Supreme Court of California (*Whitney* vs. *Superior Court,* 182 Cal., 114). The Supreme Court of the state there said:

> "We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of the *federal* and state constitution." (Our italics.)

In the circumstances—with no discussion of the Federal constitutional contentions in the opinion of "the highest court of the state in which a decision in the suit could be had"—the practice here adopted was the necessary and inevitable practice. The briefs in the state court cannot be made a part of the record; the arguments in the state court are as matter of usual practice not preserved in any form. Unless a certificate or order of the state court were sufficient it would, in such a situation, be absolutely impossible to establish that there had been "drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution of the United States."

That the practice here adopted *was* the correct practice and that plaintiff-in-error is entitled to a re-hearing is established by the precise authority of this Court in *Consolidated Turnpike Co.* vs. *Norfolk Railway Co.* (228 U. S., 596). A writ of error "under section 709 Revised Statutes, now section 237 of the new Judicial Code" had been dismissed (228 U. S., 326, 330), on the ground that no federal question had been sufficiently raised in the Virginia courts. In support of an application for a rehearing it was pointed out (228 U. S., at page 598), that the certificate of the presiding judge "contains a recital to the effect that 'the Court orders it to be certified and made a part of the record in this case, and the Honorable James Keith, President Judge of said Supreme Court of Appeals, does now certify,'" etc. This Court upon the petition for a rehearing decided at page 599 that

> "to prevent any possible inference that there was any intention to doubt in the slightest degree the accuracy of the statement contained in the certificate of the presiding judge of the court below, we have concluded that as it is recited in the certificate that it was made by the order of the court itself for the purpose of affording record evidence of the fact that a Federal question was considered and disposed of, that we may treat the certificate to that effect as incorporating into the record the necessary proof of the existence of some Federal question as the basis upon which our authority to review may be exerted."

A similar practice was involved and a like ruling made in the late case of *Gitlow* vs. *New York*. Application was made to Mr. Justice Brandeis for a writ of error. He questioned whether the remittitur of the New York Court of Appeals showed with sufficient certainty that Federal questions under the Fourteenth Amendment had been before the New York court. A motion was therefore made in the Court of Appeals to amend the remittitur by court order showing this fact. The remittitur was amended by a recital in the precise form of the recital in this case that the question of the constitutionality of the statute and of its application "was considered and passed upon." Application for a writ of error was made to the full bench of this court and was granted (260 U. S., 703), and this court proceeded to review the case upon its merits (45 Sup. Ct., 625).

Wherefore, plaintiff-in-error prays that an order may be made for a re-hearing of this cause.

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,

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Certificate of Counsel.

We hereby certify that we are the counsel for the plaintiff-in-error here, that the foregoing petition for a re-hearing is not interposed for delay and that in our judgment the said petition is well founded.

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