(Original - Signed)

Supreme Court of the United States

OCTOBER TERM—1936.

No. .....

ELECTRIC BOND AND SHARE COMPANY,
AMERICAN GAS AND ELECTRIC COMPANY,
AMERICAN POWER & LIGHT COMPANY,
NATIONAL POWER & LIGHT COMPANY,
ELECTRIC POWER & LIGHT CORPORATION,
UNITED GAS CORPORATION,
POWER SECURITIES CORPORATION,
LEHIGH POWER SECURITIES CORPORATION,
UTAH POWER & LIGHT COMPANY,
NEBRASKA POWER COMPANY,
PACIFIC POWER & LIGHT COMPANY,
UNITED GAS PUBLIC SERVICE COMPANY,
HOUSTON GULF GAS COMPANY,
APPALACHIAN ELECTRIC POWER COMPANY,
ATLANTIC CITY ELECTRIC COMPANY,
EASTON CONSOLIDATED ELECTRIC COMPANY,
THE OHIO POWER COMPANY,
PENNSYLVANIA POWER & LIGHT COMPANY,
THE SCRANTON ELECTRIC COMPANY,
THE WASHINGTON WATER POWER COMPANY,
CENTRAL ARIZONA LIGHT AND POWER COMPANY,
INDIANA & MICHIGAN ELECTRIC COMPANY,
IDAHO POWER COMPANY,
THE MONTANA POWER COMPANY,
SPOKANE UNITED RAILWAYS,
SPOKANE CENTRAL HEATING COMPANY and
MONTANA POWER GAS COMPANY,
Defendants-Appellants,

against

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

and

HOMER S. CUMMINGS, individually and as Attorney General of the United States, JAMES A. FARLEY, individually and as Postmaster General of the United States, and JAMES M. LANDIS, ROBERT E. HEALY, GEORGE C. MATHEWS, JAMES D. ROSS and WILLIAM O. DOUGLAS, individually and as constituting the Securities and Exchange Commission,
Cross-Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

THOMAS D. THACHER,
JOHN F. MacLANE,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray that a writ of cer-

States District Court for the Southern District of New York, which was entered in this cause on March 8, 1937.

An appeal to the Circuit Court of Appeals for the Second Circuit was allowed on April 5, 1937 by said District Court, and the transcript of record on appeal was filed in the Circuit Court of Appeals on May 3, 1937. No proceedings have been had in that Court.

Opinion Below.

The opinion of the United States District Court for the Southern District of New York (R. 2172) was filed on January 29, 1937 and is reported in 18 F. Supp. 131.

Jurisdiction.

The decree of the United States District Court sought to be reviewed was entered on March 8, 1937. Jurisdiction to issue the writ requested is found in the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, §1, 43 Stat. 938 (28 U. S. C. A. §347(a)).

Statute Involved

This suit was instituted by the plaintiff, Securities and Exchange Commission (hereinafter referred to as the "Commission"), pursuant to Section 18 of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. A. §79, hereinafter referred to as the "Act"), to enforce compliance with the Act by certain of the defendants, by enjoining them from violating Section 4(a) thereof and requiring them to register pursuant to Section 5. The defendants in their answer to the plaintiff's amended and

supplemental bill of complaint assert that the Act is unconstitutional and void, and in their cross-bill and counterclaim, included as part of their answer, seek to enjoin the plaintiff and cross-defendants from enforcing the Act against them, and further seek a declaratory judgment that said Act is unconstitutional and void. The Act is printed verbatim in an Appendix.

Questions Presented

1. Whether the Act is unconstitutional and void because its provisions are not within the power of Congress to regulate interstate commerce or the mails or within any other power delegated to Congress by the Constitution of the United States.

2. Whether the Act is unconstitutional and void because its provisions violate the due process clause of the Fifth Amendment, contravene the Tenth Amendment to the Constitution of the United States, or delegate legislative powers to the plaintiff Commission in violation of Section 1 of Article I of said Constitution.

3. Whether the regulatory provisions and penalties of the Act by inclusive definitions and provisions extend, without distinction, to persons and to acts without as well as to those within the constitutional authority of Congress. If so, may the penalty (denial of ordinary civil rights enforced by injunction) for non-compliance with the initial registration requirement of the Act, be applied to the petitioners or any of them without severance by competent authority of the valid from the invalid provisions of the Act, or determination of the validity and scope of the Act in its application to the petitioners or any of them

4. Whether Sections 4 and 5 of the Act are separable from the remaining provisions thereof and may, standing alone, be regarded as enacted by Congress.

5. If Sections 4 and 5 may be regarded as a separable enactment of Congress, whether they are unconstitutional and void because they are not within the power of Congress to regulate interstate commerce or the mails or within any other power delegated to Congress under the Constitution of the United States, or because they violate the due process clause of the Fifth Amendment, or delegate legislative power to the plaintiff Commission in violation of Section 1 of Article I of said Constitution.

6. Whether Sections 4 and 5, however their structure and form may be regarded, are unconstitutional and void because their purpose and effect is to exert the powers of Congress over interstate commerce and the mails to coerce registration, and thereby to make applicable to the registrants and to their subsidiaries, so long as they continue to be holding companies or subsidiaries thereof, a multitude of prohibitions, regulations and penalties which have no relation to the regulation of interstate commerce or of the mails.

7. Whether Section 4(a) contravenes the Sixth and Eighth Amendments to the Constitution of the United States because it deprives certain of the petitioners of ordinary civil rights by way of penalty and does so without trial by jury.

8. If, as held in the court below, the question of the validity of the statute upon which this suit is based, other than Sections 4 and 5 thereof, is not presented upon the

Bill and Answer, whether the petitioners, as unregistered holding companies, or as subsidiaries thereof, may secure a determination by cross-bill and counterclaim of the validity of the provisions of the Act applicable to registered holding companies and their subsidiaries.

9. Whether the operating company petitioners which are engaged solely in intrastate commerce may be subjected to regulation under the Act by a decree compelling the holding companies of which they are subsidiaries to register, without a determination of the rights, duties and obligations thereby imposed upon such petitioners.

Statement.

(a) The Act.

The Act, which was approved on August 26, 1935, provides for stringent regulation and control of public utility holding companies (hereinafter referred to as "holding companies") and their subsidiaries. A holding company is defined (Sec. 2 (a)(7)) as a company which controls an electric or gas public utility company without regard to whether or not either the holding company or the public utility company is engaged in interstate commerce or uses the mails or facilities of interstate commerce as an integral part of its business. A subsidiary is defined (Sec. 2 (a)(8)) as any company controlled by a holding company irrespective of the type of business in which it engages. While there are permissive exclusions and exemptions (Secs. 2 and 3), none of these is conditioned upon the presence or absence of interstate business, but upon the public interest or that of investors or consumers. Similarly, the activities of holding companies and their subsidiaries

which are subject to the Act, are regulated whether carried on "by use of the mails or any means or instrumentality of interstate commerce, or otherwise."

The holding companies and their subsidiaries which are subject to the Act are regulated in almost all aspects of their business except the rendition of utility service. The acquisition of securities and utility assets (Secs. 9 and 10), the sale of securities and utility assets (Sec. 12), the issuance of securities (Secs. 6 and 7), the redemption of securities (Sec. 12), the declaration of dividends (Sec. 12), the making of loans to companies in the same system (Sec. 12) and the negotiation and performance of service, sales and construction contracts (Sec. 13) by such companies are all subjected to control by the plaintiff Commission. The Act further provides that after 1940, with exceptions not here important, all holding companies whose subsidiaries do not constitute a single geographically integrated system shall cease to exist (Sec. 11).

The mechanism by which the Commission is given jurisdiction over holding companies and their subsidiaries for the exercise of these powers is that of registration by the holding company. Until such registration the system of regulation above described is not operative since it applies by its terms only to registered holding companies and their subsidiaries.* There is a mandatory requirement of

* A few of the regulatory provisions of the Act apply also to affiliates of registered holding companies and of their subsidiaries, and Section 9(a)(2) prohibits the acquisition, by use of the mails or any facility of interstate commerce, of securities of a public utility company, if the person acquiring such securities is an affiliate of such company or of any other public utility or holding company, whether registered or not, or would become an affiliate thereof by virtue of such acquisition.

registration by virtue of Section 4(b) of the Act (a section not relied upon by the plaintiff or the District Court), upon every holding company which issued securities after January 1, 1925, any of which securities were held on October 1, 1935, by persons not resident in the state in which such holding company was organized. Upon all other holding companies there is no mandatory requirement of registration, but by Section 4(a) the Act in effect compels registration by prohibiting holding companies, unless and until they register, from engaging in any business in interstate commerce or from using the mails or instrumentalities of interstate commerce for normal and usual business activities and from owning, holding, or controlling, with power to vote, securities of subsidiaries which do any of the acts prohibited to unregistered holding companies. Section 4(a) is not in and of itself a regulatory provision but a penalty to force holding companies within its terms to register.*

Registration is accomplished by filing a simple "Notification of Registration" under Section 5(a) of the Act. Thereupon, the prohibitions of Section 4(a) no longer apply to the companies which have registered, and many of the important activities prohibited to them as unregistered companies can then be carried on without any regulation whatsoever. However, the registered companies, upon registration, become subject to the jurisdiction of the Commission for the enforcement of the regulatory system above described, and must continue subject to its regulation unless and until they cease to be holding companies. Subsidiaries

* It is impossible for a holding company to continue to exist as such and comply with the provisions of Section 4(a), and it cannot cease to be a holding company because Section 4(a) pro-

of a holding company become subject to similar regulation upon registration by the holding company.

Within a reasonable time after registering by filing a Notification of Registration, each registered holding company must, pursuant to Section 5(b), file a "Registration Statement", giving full and detailed information concerning all aspects of its business except its utility operations, and similar information concerning its utility and non-utility subsidiaries. The change of status to that of a registered holding company follows immediately upon filing a notification of registration pursuant to Section 5(a) and is in no manner dependent upon filing a Registration Statement pursuant to Section 5(b).

(b) Nature of Proceeding.

This suit was commenced by the Commission to compel certain of the petitioners,* as unregistered holding companies, to register under the Act, not by enforcing Section 4(b) but by enjoining them from violating the provisions of Section 4(a). Against the other petitioners the Commission seeks no relief. Certain of these other petitioners** are unregistered holding companies which have been tem-

* Electric Bond and Share Company (Bond and Share), American Gas and Electric Company (American Gas), American Power & Light Company (American Company), National Power & Light Company (National Company), Electric Power & Light Corporation (Electric Company), United Gas Corporation (United Company), Power Securities Company, Lehigh Power Securities Corporation, Utah Power & Light Company, Nebraska Power Company, Pacific Power & Light Company, United Gas Public Service Company and Houston Gulf Gas Company.

** Appalachian Electric Power Company, Atlantic City Electric Company, Easton Consolidated Electric Company, The Ohio Power Company, Pennsylvania Power & Light Company, The Scranton Electric Company and The Washington Water Power Company.

porarily exempted from the provisions of the Act by rule of the Commission, and the remaining petitioners* are either utility or non-utility subsidiaries of one or more of the holding company petitioners.

Each of the petitioners has filed an answer in which it is alleged that the Act is unconstitutional and void and that therefore no injunction should be granted against violation of Section 4(a) thereof, and seeking, by way of cross-bill and counterclaim, both an injunction against the Commission and the cross-defendants** enjoining them from enforcing the Act, and a declaratory judgment that the Act is unconstitutional and void. The utility and non-utility subsidiaries further seek a determination of their rights should the holding companies of which they are subsidiaries be compelled to register by virtue of the decree in this suit, thus subjecting these petitioners, as subsidiaries of registered holding companies, to the jurisdiction of the Commission under the Act.

Plaintiff and cross-defendants (who appeared voluntarily waiving questions of personal jurisdiction and venue) filed a reply asking that the cross-bill and counterclaim be dismissed, on the ground that petitioners as unregistered holding companies have no standing to contest the validity of the provisions of the Act applicable solely to registered holding companies, that the cross-bill and counterclaim are

* Central Arizona Light and Power Company, Indiana & Michigan Electric Company, Idaho Power Company, The Montana Power Company, Spokane United Railways, Spokane Central Heating Company and Montana Power Gas Company.

** Homer S. Cummings, Attorney General of the United States, James A. Farley, Postmaster General of the United States, and James M. Landis, Robert E. Healy, George C. Mathews, James D. Ross and William O. Douglas, members of the Securities and Exchange Commission.

in effect a suit against the United States, that neither the plaintiff nor any of the cross-defendants have threatened to enforce the provisions of the Act applicable to registered holding companies against the petitioners, that the petitioners are not threatened with irreparable injury, and that no case or controversy within the meaning of the Declaratory Judgment Act is presented.

(c) Stipulation of Facts.

The case was tried on a stipulation of facts (R. 261-639) filed June 30, 1936. It describes in detail the inter-corporate relations, business activities and functions of each of the petitioners.

It appears therefrom that Bond and Share is the top holding company in the so-called Bond and Share holding company system, of which, under the definitions of the Act, all the other petitioners are members. Bond and Share owns voting securities in varying amounts (17.5 to 47 per cent.) in American Gas, American Company, National Company and Electric Company and 7 per cent. of the voting stock of United Company, a subsidiary of Electric Company.* These sub-holding companies, in turn, own voting securities, sufficient to give them control, in utility operating companies, and in subsidiary holding companies, most of which subsidiary holding companies are likewise operating companies. The principal business of all the holding companies, as such, and the entire business of American Company, National Company, Electric Company and United Company is to own securities in other companies, to use such power as they may derive through such

* Bond and Share owns no voting securities in any other companies in the system.

ownership to safeguard and, if possible, to enhance the value of their investments, to collect the income therefrom and to distribute such income to their own security holders.

Bond and Share has two wholly owned subsidiaries which carry out agreements for services of various kinds for the operating companies in the system other than the subsidiaries of American Gas. American Gas performs similar services for its subsidiaries.

The operating companies in the system are variously engaged in the generation, transmission and distribution of electric energy, in the production, transportation and distribution of natural and manufactured gas, and in non-utility operations of a local nature. Many of these operating companies confine all their activities entirely within the boundaries of a single state, and neither sell electricity or gas for transmission into another state, nor distribute electricity or gas generated or produced in another state (Findings of Fact 31 and 42, R. 2231, 2235; R. 489, 622). Other operating companies distribute at retail electricity or gas which has been transmitted across state lines or sell gas or electricity for transmission across state lines (*id.*). Some of them also transmit gas or electricity from one state to another for their own account or, in isolated instances, for the account of others (*id.*).* Certain of the subsidiaries in the system, such as the petitioners Spokane United Railways, Spokane Central Heating Company and Montana Power Gas Company, are not gas or electric utility or holding companies within the meaning of

* It should be noted, as above stated, that the interstate transmission or sale of electric energy or gas by either holding or operating company is neither a condition precedent to nor a subject of regulation under the Act.

the Act and transact business of a purely local nature (Finding of Fact 9, R. 2220; R. 266-267).

Petitioners against which plaintiff seeks relief admit that they are violating or threatening to violate one or more of the provisions of Section 4(a) of the Act.

(d) Action of the District Court.

The District Court held that Sections 4(a)(1), (2), (3) and (4), part of section 4(a)(6), and Section 5 of the Act are separable from the remaining provisions thereof and constitute a workable and valid law to which effect can be given even if the remaining provisions of the Act are unconstitutional. Although it stated in its opinion that enforcing Section 4(a) was tantamount to requiring registration (R. 2179), the court further held that none of the petitioners had any standing to contest the validity of the provisions of the Act applicable only to registered holding companies and their subsidiaries.

A decree was entered, enjoining each petitioner against which plaintiff sought relief from violating certain provisions of Section 4(a) of the Act, *i. e.,*

> 1. From selling or transmitting electric energy or gas in interstate commerce or owning or operating facilities for such interstate transmission;
>
> 2. From using the mails or instrumentalities of interstate commerce to
>
> (a) perform service, sales or construction contracts for any public utility or holding company;
>
> (b) distribute or make any public offering for sale of their own securities or those of any public utility or holding company;

> (c) acquire or negotiate for the acquisition of any utility assets or securities of any holding company or public utility company;
>
> 3. From owning, controlling or holding with power to vote any securities of any subsidiary that does any of the things specified in 1 and 2;

unless such petitioner ceases to be a holding company as defined by the Act or registers with the plaintiff under Section 5(a) of said Act. The cross-bill and counterclaim were dismissed.

Specification of Errors to be Urged.

1. The District Court erred in holding that Sections 4(a) and 5 of the Act constitute a constitutional, valid and reasonable regulation of interstate commerce and the mails (Assignment of Errors, 1 to 23; R. 2271-2278).

2. The District Court erred in holding that Sections 4(a) and 5 of the Act are separable from the remaining provisions thereof and that the various provisions of said sections are separable from each other (Assignment of Errors, 24 to 33; R. 2278-2282).

3. The District Court erred in not holding that the substantive regulatory system prescribed by the Act subsequent to the registration provisions is unconstitutional (Assignment of Errors, 34 and 35; R. 2282-2284).

4. The District Court erred in dismissing the counterclaim and cross-bill (Assignment of Errors, 36 to 51; R. 2284-2291).

5. The District Court erred in refusing to determine the rights, liabilities and duties under the Act of the operating company petitioners, subsidiaries of the holding company petitioners (Assignment of Errors, 52 to 68; R. 2291-2296).

6. The District Court erred in granting an injunction decree (Assignment of Errors, 69 and 70; R. 2297).

Reasons Relied on for the Allowance of the Writ.

1. Issues of great significance are involved in this case brought by the Commission to test the constitutionality of the Public Utility Holding Company Act of 1935. Questions of Federal law are involved of far-reaching importance to the parties and the public. *Landis* v. *North American Co.*, 299 U. S. 248, 256 (1936). These questions have not been, but should be, settled by this Court. They can best be settled in this case in which there are no controversies of fact and in which the questions of substantive law involved are presented without procedural or jurisdictional embarrassment. See petitioners' brief in *Landis* v. *North American Co., supra,* pp. 3-12. The parties to this suit have consistently cooperated to the end that all of the issues of law necessary to a decision might be clearly presented to this Court for its final determination, such a determination being of the most vital urgency and importance not only to the parties but to the entire industry involved and to the general public.

2. The decision appealed from is in conflict with the decisions of other Federal Courts. In the case of *Burco, Inc.* v. *Whitworth*, 81 F. (2d) 7[illegible]

rari denied 298 U. S. 724 (1936)), the Circuit Court of Appeals for the Fourth Circuit affirmed the decision in *In re American States Public Service Co.*, 12 F. Supp. 667 (D. Md. 1935), holding the Act unconstitutional as applied to American States Public Service Co.

3. The decision appealed from has decided several Federal questions in a way probably in conflict with the applicable decisions of this Court.

As shown from the Statement above, the Act has a structure peculiar to itself. It prohibits unregistered holding companies from engaging in interstate commerce, from using the mails or facilities of interstate commerce for specified purposes and from owning stock of subsidiaries which do any of the acts prohibited to unregistered holding companies (Sec. 4(a)) unless they register under Section 5(a), and then proceeds to regulate registered holding companies, not primarily with respect to the activities prohibited to unregistered holding companies but with respect to their internal business affairs, and also subjects their subsidiary companies to similar direct regulation. (Compare the so-called tax in *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936)).

The first feature of the regulatory system applicable to registered holding companies is the requirement (Sec. 5(b)) that detailed information be filed concerning the business of the registered holding company and all of its subsidiaries. This information is not related to regulation of the activities forbidden to unregistered holding companies by Section 4(a) but is designed to facilitate administration of the other provisions of the Act applicable to registered

sions, in turn, have no relation to the regulation of interstate commerce or the mails, and the registered holding company and its subsidiaries may not be free of regulation so long as the registered holding company remains a holding company, whether or not it or its subsidiaries use the mails or the facilities of commerce (Sec. 5(d)). Thus the regulatory powers of the Commission by statutory definition far exceed those which Congress may constitutionally exercise.

This being the structure of the Act, the rulings of the court below appear to be in conflict with the applicable decisions of this Court:

(a) The ruling of the court below that Sections 4(a) and 5 are separable from the substantive regulatory scheme of the Act is, we believe, in conflict with the decisions of this Court in *Williams* v. *Standard Oil Co.*, 278 U. S. 235 (1929), *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50 (1922), *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935), and *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936).

(b) The ruling of the court below that, regarding Sections 4(a) and 5 as a separable enactment of Congress, the provisions of Section 4(a) may be enforced against the petitioners is, we submit, in conflict with the decisions of this Court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), and *United States* v. *Butler*, 297 U. S. 1 (1936), because Section 4(a) is not a regulation of interstate commerce or the mails but a penalty to coerce compliance with the regulatory provisions of the Act, and Section 5, which requires the furnishing of information by and concerning

tute nor directly affect interstate commerce, is not a regulation within the powers of Congress under the Commerce Clause. *First Employers' Liability Cases*, 207 U. S. 463 (1908); *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133 (1930); *Utah Power & Light Company* v. *Pfost*, 286 U. S. 165 (1932).

(c) The ruling of the court below that Section 4(a) may be enforced against the petitioners is, we believe, in conflict with the decision of this Court in *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918), because its sole purpose and effect is to prohibit the use of the mails and the facilities of interstate commerce unless the holding company by registration submits to an unconstitutional regulation of its affairs. That Congress may not attach unconstitutional conditions to the use of the mails or the facilities of interstate commerce is well established by the decisions of this Court. *Frost & F. Trucking Co.* v. *Railroad Commission*, 271 U. S. 583 (1926); *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105 (1918); *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1 (1910); *Pullman Co.* v. *Kansas*, 216 U. S. 56 (1910); *cf. United States* v. *Butler*, 297 U. S. 1, 70 (1936).

(d) The ruling of the court below enforcing Sections 4(a) and 5 of the Act against the holding company petitioners is, we believe, in conflict with the decisions of this Court in *United States* v. *Reese*, 92 U. S. 214, 221 (1875); *Trademark Cases*, 100 U. S. 82, 98 (1879); *Baldwin* v. *Franks*, 120 U. S. 678, 685 (1887); *Ill. Central R. R.* v. *McKendree*, 203 U. S. 514, 516, 528 (1906); *First Employers' Liability Cases*, 207 U. S. 463, 489, 501 (1908); *Butts* v.

(1905), of statutory provisions no more inclusive than the terms of the statute here in question, the statute

> "must be valid as to all that it embraces or altogether void. An exception of a class constitutionally exempt cannot be read into these general words merely for the purpose of saving what remains. This has been decided over and over again."

(e) The ruling of the court below enjoining violation of Section 4(a) unless the defendant holding companies register or cease to be holding companies, without determination of the validity or scope of the Act in its application to any of the petitioners, is, we believe, in conflict with *Smith* v. *Cahoon,* 283 U. S. 553 (1931).

(f) The ruling of the court below that the petitioners have no standing to secure a determination, on their cross-bill and counterclaim, concerning the validity of the provisions of the Act applicable to registered holding companies is, we believe, in conflict with the decisions of this Court in *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), *Euclid* v. *Ambler Co.,* 272 U. S. 365 (1926), *Carter* v. *Carter Coal Co.,* 298 U. S. 238 (1936), *City Bank Co.* v. *Schnader,* 291 U. S. 24 (1934) and *Pennsylvania* v. *West Virginia,* 262 U. S. 553 (1923).

(g) The ruling of the court below that Section 4(a) is valid, and that its violation may be enjoined, raises the serious questions of constitutional law under the Sixth and Eighth Amendments propounded by Brandeis, J., in his dissenting opinion in *Milwaukee Pub. Co.* v. *Burleson,* 255 U. S. 407 (1921), since Section 4(a) prohibits the exercise of civil rights not as a regulation but as a penalty imposed without trial by jury.

Reasons for Issuance of the Writ Without Awaiting Proceedings in the Circuit Court of Appeals for the Second Circuit.

This petition for certiorari is filed prior to the decision of the Circuit Court of Appeals for the Second Circuit to which an appeal has been taken from the decree of the United States District Court for the Southern District of New York. Counsel are of opinion that the case is of such importance that it should be heard and decided by this Court without awaiting intermediate decision of the Circuit Court of Appeals.

The reasons for this position of counsel are implicit in the questions involved, as above stated, and are emphasized by the following considerations.

On November 21, 1935 (5 days prior to the filing of the original bill of complaint herein), the Attorney General of the United States issued a public release in which he stated (R. 642):

> "In enforcing the Act it is proposed promptly to institute civil proceedings against one or more large and important companies who may fail to register to enforce compliance with its provisions and to seek decisions from the Supreme Court sustaining the validity of the Act. In the meanwhile it is not proposed to institute criminal proceedings, and if later it should become necessary to institute criminal proceedings against any company, it is not the intention of this department to seek to exact penalties for earlier offenses which might unduly penalize the investors and the offending company."

This release was accompanied in time, or immediately

The filing of this suit on November 26, 1935, confirmed these expressions and assurances by the officers of the United States.

At or about the time of the filing of this suit, 47 suits against the Commission, or its members, or the Attorney General and Postmaster General, or local enforcement officers (district attorneys and postmasters) were filed in the Supreme Court of the District of Columbia, and in some twelve Federal districts.

Prior to the announcement of the Attorney General, and the commencement of the suit at bar, the United States District Court for the District of Maryland in *In re American States Public Service Co.*, 12 F. Supp. 667 (D. Md. 1935), had held that the Act was unconstitutional in its entirety. The Commission was not a party to that suit, but its counsel appeared as *amici curiae*.

Since the occurrence of the events just narrated, the law officers for the United States, and counsel for the Commission, have consistently taken the position that the case at bar should be prosecuted to its conclusion in this Court before action was taken in any of the other cases. This was emphasized by the brief filed by *amici curiae* on the appeal from the decree of the District Court in the *American States* case (*Burco, Inc.* v. *Whitworth*, 81 F. (2d) 721, C. C. A. 4th, 1936), and in opposition to the petition for certiorari to this Court after the decision of the Circuit Court of Appeals confirming, with modification, the decree of the District Court. Certiorari was denied (298 U. S. 724 (1936)).

The position of the Government is further emphasized in the litigation in the Supreme Court of the District of Columbia (*North American Co.* v. *Landis*, 85 F. (2d) 398),

which finally reached this Court under the title *Landis* v. *North American Co.*, 299 U. S. 248 (1936). We refer to the decision of this Court in that case, and to the briefs of the Government, for a statement of the Government's position as to the adequacy of this case as a vehicle to test the constitutionality of the Act.

The petitioners here, defendants in the Court below, being equally concerned with the Government to procure an adequate final determination of the questions involved in this suit, through their counsel cooperated with counsel for the Government in the preparation of a detailed and comprehensive record adequate to bring before the Court all questions which might be properly presented.

There is a difference of opinion between counsel as to the scope of the issues thus presented, but whichever view may be accepted, all facts necessary to a determination of every decisive question are fully presented by detailed stipulation so that no issues of facts are raised upon the record. Such assignments of error as are directed to findings of fact involve ultimate conclusions, rather than questions of the weight of conflicting evidence, and counsel for petitioners are of opinion that such findings of fact are, in effect, conclusions of law upon the facts stipulated.

The urgent importance to the United States of the issues involved has already been laid before this Court in *Landis* v. *North American Co., supra,* and we assume will be stated here by Government counsel.

The urgent importance of the issues to petitioners must be equally apparent from the foregoing brief analysis of the general scope and tenor of the Act, and of the questions presented on this record. The petitioners are, by

definition under the Act, members of one of the larger public utility holding company systems of the country, the subsidiaries of which (a few of which have appeared here as intervening defendants) conduct their public utility operations in over thirty states of the United States, and present points of imminent contact with every important provision of this Act. The scope and effect of the Act are such that their daily business involves questions of legality which impede and hamper their operations and place a cloud upon their entire business. Despite the forebearance of criminal prosecution, a cloud is cast upon contracts in the performance of the normal and harmless business activities prohibited by Section 4(a) because Section 26(b) provides that every contract made in violation of any provision of the Act is void. And, should they register as in effect required by the decree of the District Court, an even greater cloud would be placed upon their business since the intercorporate structure of the petitioners is such that many of them would become subject to the mandatory requirement of dismemberment and reorganization imposed by Section 11, and the operations of all of them would at once fall within the rigid system of control prescribed by the Act.

The facts hereinbefore briefly summarized, the widespread doubt in the industry as to the constitutionality of the Act, the fact that many of the important holding company systems of the country have not registered pending the final decision of this Court in this case, and the corresponding incidence of the Act upon their operations pending determination of the constitutional questions involved here, show that the importance of this case is not confined to the present parties litigant, but extends to substanti[illegible]

an entire industry which has been found to be of the same general order of importance, as measured by capital invested, as the railroad industry (Federal Trade Commission Report, Part 72-A, p. 10).

From the standpoint of the public interest, the urgency and importance of a prompt and final determination by this Court of the questions presented in this case cannot be exaggerated. An extraordinary situation is disclosed under which enforcement of a statute of the United States, regulating, or assuming to regulate, a great industry, is quite properly held in abeyance upon the responsibility of the officers of the United States pending the time when this Court shall ultimately determine these questions. Under these circumstances, the interests of the United States, of the petitioners, and, even more emphatically, the interest of the people of the United States, justify the issuance of the writ at this time.

As stated by Mr. Justice Cardozo in *Landis* v. *North American Co., supra:*

> "In these Holding Company Act cases great issues are involved, great in their complexity, great in their significance. * * * On the law there will be problems of far-reaching importance to the parties and the public."

That issuance of the writ at this time is necessary and appropriate clearly appears from the practice of this Court as indicated in *United States* v. *Bankers Trust Co.*, 294 U. S. 240 (1935); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935); *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936); and in other cases in which writs of certiorari have been granted before [illegible]

cuit Court of Appeals, or of the Court of Appeals for the District of Columbia.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the District Court for the Southern District of New York be reversed by this Honorable Court, and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

Dated, New York, N. Y., May 15, 1937.

Thomas D. Thacher

John J. MacLean

Counsel for Petitioners.

Appendix.

[PUBLIC—No. 333—74TH CONGRESS]

[S. 2796]

AN ACT

To provide for control and regulation of public-utility holding companies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public Utility Act of 1935".

TITLE I—CONTROL OF PUBLIC-UTILITY HOLDING COMPANIES

NECESSITY FOR CONTROL OF HOLDING COMPANIES

SECTION 1. (a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.