No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

MARRINER S. ECCLES, RONALD RANSOM, M. S. SZYMCZAK, JOHN K. MCKEE, ERNEST G. DRAPER AND RUDOLPH M. EVANS, *Petitioners*

v.

PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The Solicitor General, on behalf of Marriner S. Eccles, Chairman of the Board of Governors of the Federal Reserve System, Ronald Ransom, M. S. Szymczak, John K. McKee, Ernest G. Draper and Rudolph M. Evans, members of said Board, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on April 14, 1947.

OPINIONS BELOW.

The opinion of the United States District Court for the District of Columbia holding that the controversy is justiciable (R. 11-23) is reported in 64 F. Supp. 811. The memorandum opinion of that court dismissing the complaint (R. 113-117) is unreported. The opinion of the United States Court of Appeals for the District of Columbia (R. 121-132) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 14, 1947 (R. 133). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

(1) Whether the Board exceeded its statutory authority in imposing a condition of membership "pursuant" to Section 9 of the Federal Reserve Act.

(2) Whether respondent under the circumstances of this case is not estopped from challenging the validity of the Condition.

(3) Whether the District Court had jurisdiction to entertain a declaratory judgment action attacking the validity of the Condition, the Board having neither acted nor threatened to act under the Condition, and whether the case is premature in view of respondent's failure to exhaust its administrative remedy.

STATUTE INVOLVED.

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 20-22.

STATEMENT.

In 1941 respondent, Peoples Bank of Lakewood Village, California (hereinafter sometimes referred to as the Bank), applied to the Board of Governors of the Federal Reserve System (hereinafter referred to as the Board) for admission to the Federal Reserve System (hereinafter referred to as the System) (R. 40-41). Its application was at first denied by the Board (R. 50) but, subsequently, after being reconsidered in the light of certain assurances by the Bank and all of its stockholders concerning the independent status of the institution (R. 52-58), it was approved by the Board. In May 1942 the Bank was admitted to System membership subject to the following condition, among others:

> 4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System. (R. 59)

In February 1944 Transamerica Corporation, without prior approval of the Board and without the knowledge of the Bank, acquired a number of the Bank's shares, which were registered in its name on the Bank's records (R. 6). Respondent reported this

fact to the Board (R. 7), and in December 1945 demanded that Condition No. 4 be cancelled. This demand was not "complied with" (R. 7). Thereafter this proceeding was commenced by the Bank to have Condition No. 4 declared invalid and to enjoin the Board from enforcing the same (R. 1-9).

Petitioners moved to dismiss the complaint in the District Court on the ground that, as they had not threatened to enforce the Condition, no justiciable controversy was presented by the pleadings (R. 10). In support of this motion petitioners submitted, in affidavit form, an excerpt from the minutes of the Board of January 28, 1946, as follows:

> Upon consideration of the latest report of examination of the Peoples Bank, Lakewood Village, California, from which the Board concluded that there had been no substantial change in the control, management or policy of the bank resulting from the acquisition by Transamerica Corporation of certain shares of the bank's stock, the Board, by unanimous vote, decided that there was no present need in the public interest for any action by the Board with respect to the condition of membership of the bank relating to acquisition of its stock by Transamerica Corporation. (R. 10-11)

Petitioner's motion to dismiss was denied (R. 10-23).

Thereafter petitioners filed their joint and several answer in which they set forth two defenses. The first was that the Bank, having enjoyed for almost four years the benefits of System membership which resulted from its voluntary acceptance of Condition No. 4, was estopped from challenging the validity of the Condition. The second defense was that the complaint failed to state facts upon which any relief could be granted (R. 23-24).

On this state of the record petitioners moved for judgment on the pleadings (R. 25). The Bank countered with a motion for summary judgment, filing a number of affidavits in support of its motion (R. 25-111). It was stipulated that any relevant and admissible facts contained in these affidavits might be considered by the District Court in deciding both motions (R. 111-112). On June 3, 1946, that court granted petitioners' motion for judgment on the pleadings, holding that the Bank was legally estopped from challenging the Condition (R. 113-117). At the same time the court denied respondent's motion for summary judgment (R. 118). Judgment dismissing the complaint was entered on June 6, 1946 (R. 118). On appeal the court below reversed, Mr. Justice Edgerton dissenting (R. 121-132).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the District of Columbia erred:

(1) In holding that Condition No. 4 as literally construed is invalid because of an alleged unlawful "purpose" of the Board in imposing the Condition.

(2) In holding that the Board and its counsel made certain alleged "concessions" having the effect of modifying the literal terms of the Condition in the manner stated in the majority opinion.

(3) In limiting the statutory right of the Board to invoke the Condition by requiring the finding of facts not suggested by the Condition itself.

(4) In holding that the action presents a justiciable controversy within the meaning of the Declaratory Judgment Act.

(5) In failing to hold that the case was premature because of respondent's failure to exhaust its administrative remedy.

(6) In holding that respondent is not legally estopped from challenging the validity of Condition No. 4.

(7) In overruling the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

This case presents for the first time in the courts an important question concerning the statutory authority of the Board to condition the admission of banks to System membership. The majority opinion below unduly expands the jurisdiction of the courts to supervise the administration of a comprehensive Congressional scheme of bank regulation, even to the point of substituting the court's views for that of the Board in a matter patently involving the application of an informed judgment and discretion. There are also presented two additional questions of considerable importance—whether the case at bar presents a justiciable controversy under the federal declaratory judgment statute, and whether respondent, by agreeing to Condition No. 4 and accepting the benefits of System membership resulting therefrom, is not estopped from now asserting the alleged invalidity of the Condition.

(1) Because of the nature of the majority opinion below, the first issue, which relates to the authority of the Board to impose conditions of membership, is divided into two parts. The first relates to that portion of the court's opinion which holds that the Condition, as "literally" construed, is invalid. The second relates to a subsequent portion of the majority opinion in

which the court in effect rewrote the Condition in the light of certain "concessions" alleged to have been made by the Board and its counsel since the initiation of these proceedings.

(a) Under Section 9 of the Federal Reserve Act (hereinafter referred to as the Act), the Board is granted specific authority to impose membership conditions "pursuant" to that Act.

When it receives the application of a non-insured State bank (the situation in the case at bar), the Board is required by the statute to consider two sets of critical data respecting the applicant. The first, which relates to the bank's eligibility for admission to the System, includes "the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes" of the Federal Reserve Act. Sec. 9(3), 12 U. S. C. 322. The second, which relates to the bank's eligibility for federal deposit insurance coverage,[1] includes the "financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes" of the insurance section of the Act. Section 12B(g), 12 U. S. C. 264g.

Condition No. 4 relates to the "character of * * * management", one of the subjects which the Board was

[1] Under the Act deposit insurance coverage may be obtained by a bank in one of two ways. It may apply directly to the Federal Deposit Insurance Corporation, in which event the Board takes no part in the consideration of the bank's application. Or, as here, a non-insured bank may apply for membership in the System, in which event its admission automatically entitles it to federal insurance coverage.

required by both statutes to consider in passing upon respondent's application. The application for membership had been approved by the Board because of the Bank's character as a "bona fide local independent institution" (R. 60). It is elementary that the responsibility for supplying the "management" of a corporation is placed by law upon its stockholders. The Board could properly have concluded that to permit Transamerica to obtain an interest in respondent would affect the character of respondent's management.[2] If the Board believed the Transamerica management policy to be harmful to the sound banking system which the Federal Reserve Act was designed to establish (see R. 84), and had some basis for thinking that Transamerica had designs on respondent, there was good reason for its requirement that respondent be allowed to enter the system only on condition that it retain its independence of Transamerica.

Next, the record shows that, at or about the time the Board acted upon respondent's application, there was unanimity of opinion between the three federal bank supervisory agencies, the Board, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, that the Transamerica bank expansion policy was unsound (R. 69-70, 84). Indeed, the latter had "indicated its unwillingness . . . to insure any newly organized State nonmember bank in which Transamerica

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[2] It is recognized that ownership of a majority of the voting shares of one corporation by another is not necessary in order to obtain practical working control of such company. "Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control . . . Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of intercorporate relationships." *North American Co.* v. *Securities and Exchange Commission,* 327 U. S. 686, 693.

Corporation ha[d] a substantial interest." (R. 84) From the standpoint of deposit insurance there are obvious reasons for not permitting too large a portion of the insurance to cover a single organization. Such a determination by the Insurance Corporation clearly was entitled to the highest respect by the Board, particularly in view of the fact that, by being admitted to System membership, respondent automatically became entitled to deposit insurance coverage. This situation supplies another "purpose" directly traceable to the statute itself.

Finally, as the majority opinion points out, the record shows that Transamerica is "a large corporation, owning extensive interests in many banks and in other corporations as well." (R. 124.) The court below was referred to a table appearing in the Congressional Record (Vol. 90, p. A3018) in which it appeared that as of December 31, 1943, the banks and branches in the Transamerica group comprised almost 40 per cent of all the banks and branches in the area covered by the States of Arizona, California, Nevada, Oregon and Washington, with an even higher ratio in the State of California. In the light of this situation the Board clearly had the right to conclude that sound banking required the development of the independent banking structure of that area. The Board is authorized (Section 9(1), 12 U. S. C. 321) to prescribe conditions of membership "pursuant" to the provisions of the Act. Since the Act was plainly intended to establish a sound banking system for member banks, conditions designed to accomplish that statutory objective were clearly authorized. As a dispenser of federal privileges in the banking field, the Board also could properly take into account the national policy against restraints of com-

merce and monopoly as contained in federal antitrust laws and could therefore validly condition the grant of such privileges in the light of the objectives sought by those statutes. Cf. *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 222-224. These considerations, which supply still other valid purposes for the Board's action in imposing the Condition, are emphasized by the fact that, under Section 11 of the Clayton Act (15 U. S. C. 21), the Board is granted specific authority to enforce certain sections of that Act, including the prohibitions in Section 7 (15 U. S. C. 18) against acquisitions of stock between competing companies engaged in commerce, where the effect of such acquisitions results in substantially lessened competition between those companies, restrains trade or commerce, or tends to create a monopoly.

The majority below invalidated Condition No. 4 as drawn because of an alleged "purpose" which the court found to have motivated the Board in imposing the Condition. That "purpose", as found by the court, was "to check the growth of Transamerica Corporation" through the device of the Condition—a purpose the court found beyond the Board's power to entertain and which allegedly rendered the Condition not one "pursuant" to the Act. But the considerations set forth above show that the Condition was legitimately related to functions which the Board could properly have taken into account in determining whether to approve respondent's application.

If we assume the motive of the Board to be relevant, the court below was not justified in concluding that the purpose related to the growth of Transamerica rather than to the factors relating to respondent which the Board could properly have considered. Nothing in the record proves the former to have been the Board's pur-

pose.[3] The record does disclose that the Board regarded the Transamerica "financial policies" as not "consistent with the public interest", and that the Board was opposed to the further expansion of Transamerica (R. 84). But the fact that the Board deemed the further expansion of Transamerica contrary to the public interest would not mean that restrictions upon respondent so as to preserve its independence of Transamerica were not conditions related to the character of respondent's management, a matter which the Board was specifically required to consider.

Since the Condition was not invalid on its face, and since it could have resulted from entirely lawful motives, it was improper for the court below to assume that the Board's purposes was dehors the statute. "Official acts of public officers" are supported by a "presumption of regularity", not the contrary. *United States* v. *Chemical Foundation,* 272 U. S. 1, 14.

(b) Having invalidated the Condition according to its literal terms, the opinion below then goes on to point out a number of "concessions" alleged to have been made by the Board and its counsel respecting the Condition. These "concessions" had the effect, according to the court, of modifying the literal terms of the Condition. The court concluded that, as so modified, the Condition is valid, but that before the Board can take any action pursuant thereto it must first find, after

[3] The complaint alleged no facts concerning the existence of such a "purpose". The Board's answer was limited solely to legal defenses, the Board electing to stand upon the Condition as drawn by filing a motion for judgment on the pleadings contemporaneously with the filing of its answer. The only facts which were before the lower court were those contained in certain affidavits submitted in conjunction with respondent's motion for summary judgment. None of those, however, disclose the Board's "purpose" in imposing the Condition. Finally, the opinion itself contains no factual reference to support the conclusion as to "purpose".

hearing, that the safety of the Bank's depositors has been jeopardized by the Transamerica acquisition of the Bank's shares. The effect of this ruling is to emasculate the Condition. Indeed, the opinion specifically states that, as modified, the Condition "means no more, and gives the Board no greater authority, than standard Condition No. 1, which is that 'subject bank at all times shall conduct its business and exercise its powers with due regard to the safety of its depositors, . . .'" (R. 129). Such a result denies to the Board the authority to impose conditions of membership within the full reach of its delegated power, and, in the case at bar, imposes additional procedural requirements to those prescribed by the statute.

Nothing in the record of this case would seem to justify the action of the majority below in thus stripping the Condition of its vitality. Aside from the fact that the sources of the so-called "concessions" are separated in the opinion from the contexts in which they were submitted in the lower courts, the literal texts of those statements do not support the conclusion reached by the majority. The resolution of the Board referred to in the opinion[4] was submitted as part of the motion to dismiss for lack of a justiciable controversy (R. 10-11). It was intended to show that the Board had not acted upon, nor threatened to act upon, the Condition at the time the suit was brought. The two extracts from the Board's brief likewise were directed to showing the lack of a justiciable controversy. One[5]

[4] Supra, p. 4.

[5] "Condition No. 4, however, is not self-executing, as appears on its face. And the Board, in affixing the Condition in the light of the opinion which it then entertained as to the potential danger of Transamerica affiliation, did not by so acting declare in advance what its administrative decision might be if and when Trans-

urged that the Condition on its face was not self-executing; and that the 60-day notice provided for in the Condition negatived the idea of any imminent threat to respondent's status as a member bank. The other[6] pointed out that, even if the 60 day notice were sent and respondent refused voluntarily to withdraw, as agreed, then under Section 9(8) (12 U. S. C. § 327) of the Act a hearing before the Board would be required before respondent could be expelled for breach of the Condition; and this rendered even more remote respondent's alleged cause of action. Nothing in the literal language of those statements is inconsistent with or negatives the right of the Board to take action under the Condition whenever it might appear appropriate to do so to effectuate any of the legitimate objectives of the Condition discussed hereinabove. Nor is the Condition inconsistent with the statutory right to a hearing.

The conclusion drawn by the lower court from these statements, that Condition No. 4 means "no more, and gives the Board no greater authority, than standard Condition No. 1" (R. 129), is thus plainly a *non sequitur*.

Furthermore, in holding that, before the Board might validly invoke the Condition, it must first find,

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america should acquire some of appellant's shares. In affixing the Condition—by agreement with appellant—the Board intended to leave to future determination what action, if any, might be necessary pursuant thereto. Considerations of the public interest demanded that the Condition be imposed; the same considerations will determine when, if ever, the Condition need be enforced." (R. 129.)

[6] "Even should appellant, if and when it receives such notice, take no action pursuant thereto, its membership could not be summarily forfeited. Section 9 of the Act (46 Stat. 250, 251, c. 207, U. S. C., Title 12, § 327) provides that, while the Board may order such a forfeiture, it can only do so 'after hearing' and a finding that appellant 'has failed to comply with the provisions of . . . [the law] or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto . . .' Appellant's alleged danger is thus rendered even more remote." (R. 130.)

after hearing, that there has been "a change for the worse" in the Bank's personnel, in its banking policies, or in the safety of its deposits resulting from the Transamerica acquisition of Bank shares, the lower court has imposed a requirement beyond the plain terms of the statute. As stated, should it become necessary for the Board to take action under the Condition, and the Bank refuses to withdraw following receipt of the sixty days' written notice, the Board may institute proceedings under Section 9(8) of the Act to expel the Bank from System membership.[7] The Board will then hold a hearing, but the only finding which the Board is required by the statute to make is that the Bank "has failed to comply with the provisions of this section"—in this case with a condition lawfully imposed pursuant to Paragraph 1 of that section.[8]

In holding that the Condition literally interpreted was unrelated to matters which the Board had lawfully

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[7] "If at any time it shall appear to the Board of Governors of the Federal Reserve System that a member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by this section."

[8] The Board's Resolution (supra, p. 4), concluding that it will not invoke the Condition because of Transamerica's present acquisition of shares, was based on the finding that "there had been no substantial change in the control, management or policy" resulting from the acquisition. The Resolution clearly implies that if in the future Transamerica's acquisition should cause a change in control, management or policy, the Board would feel free to invoke the Condition without the necessity of making additional findings, which would otherwise be required under Condition No. 1, as to a lessening of safety to depositors.

considered and in requiring the Condition to be given a restrictive construction, the opinion below also appears to conflict with the decisions of this Court defining the boundaries of judicial interference with administrative discretion. The determination as to what conditions of membership should be imposed requires the appraisal of imponderables calling for highly technical and expert judgment, judgment which Congress has entrusted to the Federal Reserve Board. "It is a fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.' " *American Power & Light Co.* v. *Securities and Exchange Commission,* 329 U. S. 90, 112; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 194. And there is special reason for heeding the admonition that courts are not to override the exercise of administrative discretion in the field of banking, as many decisions show. *Adams* v. *Nagle,* 303 U. S. 532; *Kennedy* v. *Gibson,* 8 Wall. 498; *National Bank* v. *Case,* 99 U. S. 628; *Bushnell* v. *Leland,* 164 U. S. 684; *Apfel* v. *Mellon, et al.,* 33 F. 2d 805 (App. D. C.), certiorari denied, 280 U. S. 585; *Raichle* v. *Federal Reserve Bank,* 34 F. 2d 910 (C. C. A. 2); *United States Savings Bank* v. *Morgenthau,* 85 F. 2d 811 (App. D. C.), certiorari denied, 299 U. S. 605, rehearing denied, 301 U. S. 666.

(2) Petitioners also submit that since respondent accepted the Condition as a means of obtaining valuable federal privileges which otherwise it would not have obtained, it is now estopped from challenging the validity of the Condition The complaint was dismissed by

the District Judge solely on this ground (R. 113-117). The court below reversed, holding that whether respondent is estopped in this case "depends entirely upon whether Condition No. 4 is valid or invalid." (R. 131.) This ruling ignores fundamental principles defining the circumstances under which estoppels arise. Its effect is virtually to eliminate estoppel as a defense in any action in which administrative action is challenged, a result plainly in conflict with the principles announced in numerous decisions of this Court.

Whether or not waiver or estoppel has occurred in a particular case is clearly unrelated to the merits of the right asserted. Indeed, if proven, either precludes judicial inquiry into the merits of the claim. Thus this Court in numerous decisions has held that one who obtains the privileges or benefits under a statute is thereafter estopped from challenging other provisions of that statute, even on constitutional grounds. *United Fuel Gas Company* v. *Railroad Commission,* 278 U. S. 300; *Pierce Oil Corporation* v. *Phoenix Refining Company,* 259 U. S. 125; *St. Louis Malleable Casting Company* v. *Prendergast Construction Company,* 260 U. S. 469.[9] "There is nothing in the nature of such a constitutional right . . . to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right." *Pierce Oil Corporation* v. *Phoenix Refining Company, supra,* 259 U. S. 125, 128-129.[10]

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[9] See also *Hurley* v. *Commission of Fisheries,* 257 U. S. 223; *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407. Compare *United States* v. *City and County of San Francisco,* 310 U. S. 16, 28-29.

[10] ". . . appellee adopted a course of conduct consistent throughout only with its apparent purpose to comply with the order; and now, without tendering any excuse for the belated disclosure of

We perceive no valid distinction between an estoppel applied to prevent a challenge of the constitutional authority of a State legislature or the Congress to enact a particular statute, and one applied to prevent a challenge of action by an administrative agency. In each case the fundamental objection to validity is that the body which has acted has done so in a manner not permitted by the written law which defines its authority. And this proposition seems to have been recognized by the Court of Appeals for the First Circuit, *White Star Bus Line* v. *People of Puerto Rico,* 75 F. 2d 889 (C. C. A. 1), certiorari denied, 296 U. S. 606, in an opinion with which the court below seemingly disagrees (R. 130-131).

(3) The question is also presented as to whether respondent's action was prematurely brought. By granting a declaratory judgment on the present record the lower court ignored the well-settled principle that the Declaratory Judgment Act does not authorize the Federal courts to issue "an advisory decree" upon "hypothetical controversies which may never become real". *Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 443; *Coffman* v. *Breeze Corporations, Inc.,* 323 U. S. 316, 324.[11]

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its real purpose, it asks relief from the condition only after it has enjoyed benefits which it cannot be said would have been granted without the condition. Neither this Court nor the court below is acting any the less as a court of equity because its powers are invoked to deal with an order of the Interstate Commerce Commission. The failure to conform to those elementary standards of fairness and good conscience which equity may always demand as a condition of its relief to those who seek its aid, seems to require that such aid be withheld from this appellee. See *Davis* v. *Wakelee,* 156 U. S. 680." Stone, dissenting, *United States* v. *Chicago, M., St. P. & P. R. Co.,* 282 U. S. 311, 342.

[11] See also *Maryland Casualty Co.* v. *Pacific Co.,* 312 U. S. 270, 273; *Helco Products Co.* v. *McNutt,* 137 F. 2d 681 (App. D. C.).

This Court has held that an indispensable element of justiciability in suits against public officers of the kind involved here is a showing of either positive action or a threat to take such action by the officials involved. "The pronouncements, policies and program of [public authorities] . . ., their motives and desires, [do] not give rise to a justiciable controversy save as they [have] fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining." *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324. The record in this case indisputably shows that the Board has neither acted nor threatened to act under the Condition. Although not acceding to respondent's demand that the Condition be cancelled, the Board, as we have seen, had concluded that there was no present need for action under the Condition. And the Condition itself requires that the Board must first give respondent sixty days' notice of an intention to invoke it. Such a period would afford respondent ample time within which to test its rights, if any, to have the Condition reviewed by the courts. Clearly, therefore, the majority below were in error in concluding that a legal threat is implicit in the Condition itself.

In addition, if respondent refuses to withdraw from the System, it will be entitled to an administrative hearing before expulsion, and the ultimate administrative decision could be judicially reviewed. Cf. *Federal Reserve Board* v. *Agnew,* 329 U. S. 441. Accordingly, the case is also premature because respondent has not exhausted its administrative remedy.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

GEORGE B. VEST,
General Counsel,
Board of Governors,
Federal Reserve System.

MAY, 1947.

APPENDIX.

Section 9 of the Federal Reserve Act (12 U. S. C. § 321, et seq.) provides in pertinent part as follows:

> SEC. 9. Any bank incorporated by special law of any State, or organized under the general laws of any State or of the United States, including Morris Plan banks and other incorporated banking institutions engaged in similar business, desiring to become a member of the Federal Reserve System, may make application to the Board of Governors of the Federal Reserve System, under such rules and regulations as it may prescribe, for the right to subscribe to the stock of the Federal reserve bank organized within the district in which the applying bank is located. Such application shall be for the same amount of stock that the applying bank would be required to subscribe to as a national bank. For the purposes of membership of any such bank the terms "capital" and "capital stock" shall include the amount of outstanding capital notes and debentures legally issued by the applying bank and purchased by the Reconstruction Finance Corporation. The Board of Governors of the Federal Reserve System, subject to the provisions of this Act and to such conditions as it may prescribe pursuant thereto may permit the applying bank to become a stockholder of such Federal reserve bank.
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> In acting upon such applications the Board of Governors of the Federal Reserve System shall consider the financial condition of the applying bank, the general character of its management, and whether or not the corporate powers exercised are consistent with the purposes of this Act.
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> * * * * * * * * *
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> If at any time it shall appear to the Board of Governors of the Federal Reserve System that a

member bank has failed to comply with the provisions of this section, or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by this section.

Section 12B of the Federal Reserve Act (12 U. S. C. § 264(a), et seq.) provides in pertinent part as follows:

(e)(1) * * *

(2) After the effective date, every national member bank which is authorized to commence or resume the business of banking, and every State bank which is converted into a national member bank or which becomes a member of the Federal Reserve System, shall be an insured bank from the time it is authorized to commence or resume business or becomes a member of the Federal Reserve System. The certificate herein prescribed shall be issued to the Corporation by the Comptroller of the Currency in the case of such national member bank, or by the Board of Governors of the Federal Reserve System in the case of such State member bank: *Provided,* That in the case of an insured bank which is admitted to membership in the Federal Reserve System or an insured State bank which is converted into a national member bank, such certificate shall not be required, and the bank shall continue as an insured bank. Such certificate shall state that the bank is authorized to transact the business of banking in the case of a national member bank, or is a member of the Federal Re-

serve System in the case of a State member bank, and that consideration has been given to the factors enumerated in subsection (g) of this section.

* * * * * * * * *

(g) The factors to be enumerated in the certificate required under subsection (e) and to be considered by the board of directors under subsection (f) shall be the following: The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this section.