

/69

# Supreme Court of the United States

October Term, 1968

Office Supreme Court, U.S.  
FILED

JAN 23 1969

JOHN F. DAVIS, CLERK

In the Matter of:

-----X  
ELLIOTT GOLDEN, AS DISTRICT ATTORNEY  
OF THE COUNTY OF KINGS

Appellant

VS

SANFORD ZWICKLER

Appellee  
-----X

Docket No. 370

Duplication or copying of this transcript  
by photographic, electrostatic or other  
facsimile means is prohibited under the  
order form agreement.

Place Washington, D. C.

Date January 16, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

ORAL ARGUMENT OF:

P A G E

Samuel A. Hirshowitz, Esq. on behalf of Appellant

2

Emanuel Redfield, Esq. on behalf of Appellee

20

\*\*\*\*\*

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 ----- x  
4 Elliott Golden, as District Attorney :  
of the County of Kings :  
5 Appellant, :  
6 v. : No. 370  
7 Sanford Zwickler :  
8 Appellee. :  
9 ----- x

10 Washington, D. C.  
11 Thursday, January 16, 1969

12 The above-entitled matter came on for argument at  
1:45 p.m.

13 BEFORE:

14 EARL WARREN, Chief Justice  
15 HUGO L. BLACK, Associate Justice  
16 WILLIAM O. DOUGLAS, Associate Justice  
17 JOHN M. HARLAN, Associate Justice  
18 WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
ABE FORTAS, Associate Justice  
THURGOOD MARSHALL, Associate Justice

19 APPEARANCES:

20 SAMUEL A. HIRSHOWITZ, Esq.  
First Assistant Attorney General  
21 New York, New York

22 EMANUEL REDFIELD, Esq.  
New York, New York

23 0o0  
24  
25

1                                    P R O C E E D I N G S

2            MR. CHIEF JUSTICE WARREN: No. 370, Elliott Golden  
3 as District Attorney of the County of King, Appellant, versus  
4 Sanford Zwickler.

5            Mr. Hirshowitz.

6            ORAL ARGUMENT OF SAMUEL A. HIRSHOWITZ, ESQ.

7            ON BEHALF OF APPELLANT

8            MR. HIRSHOWITZ: Mr. Chief Justice, and may it please  
9 the Court.

10           This is an appeal from a decision of the Three-Judge  
11 Court in the Eastern District. This case has been up here  
12 before. At that time, it was under the name of Zwickler  
13 against Koota and since that time Mr. Koota has become a Judge  
14 of the State Supreme Court and Mr. Golden became Acting  
15 District Attorney and we substituted his name.

16           Beginning January 1, a newly elected District Attorney,  
17 Eugene Gold has become District Attorney.

18           Now when this Court remanded the case to the Dis-  
19 trict Court, it did that with the caution that the Court  
20 should first determine whether there was a substantial con-  
21 troversy between the parties having adverse legal interests of  
22 sufficient immediacy and reality to warrant the issuance of  
23 declaratory judgment.

24           We submit that Judge Rosling and his associates mis-  
25 understood Judge Brennan because Judge Rosling said in his  
opinion "Don't forget this case was started in 1965."



1           It came here in '67 and came back to Judge Rosling  
2 in '68. At that time as Justice Brennan pointed out in his  
3 opinion, the target of Mr. Zwickler had become a Supreme Court  
4 Judge and it appeared that this was Zwickler's only target.

5           At any rate Judge Rosling dismissed the whole thing  
6 with this statement: We see no reason to question Zwickler's  
7 assertion -- which was in the complaint -- that the challenged  
8 statute currently impinges upon his freedom of speech by  
9 deterring him from again distributing handbills, his own  
interest as well as that of others.

10           And bear in mind that this is not a class action but  
11 Judge Rosling imported a class action into the action -- who  
12 would, with like anonymity, practice free speech in a political  
13 environment persuade us in a justice of this plea.

14           And it is our submission that the record that Judge  
15 Rosling had at the time he made the decision that is being  
16 appealed from did not have the sufficient immediacy and reality  
17 that was referred to in the opinion of this court in the  
18 original appeal.

19           In addition to that, the Three-Judge Court granted  
20 an injunction, and you will see in the opinion the granting  
21 of the injunction consists of about two sentences.

22           This again was not following the opinion of this  
23 court written by Justice Brennan because Justice Brennan  
24 referred to Douglas against Jeannette in the opinion and I  
25 might cite the U. S. against Raines there in which the Court

1 said there are rigid rules for an injunction. There is nothing  
2 like that in this case.

3 On the contrary, the complaint says that District  
4 Attorney Koota is a very faithful person, very faithful  
5 officer, and there is no reason why an injunction was granted  
6 by the Court.

7 Now the reason I bring this up at the outset is that  
8 some of the judges in the Southern and Eastern Districts have  
9 become confused by the opinion in the Zwickler case and this  
10 opinion, and when we appear before them as I did last week,  
11 we had to do quite a bit of explaining as to what our conception  
12 was of when you get declaratory judgment, when you are entitled  
13 to an injunction.

14 They took it from Judge Rosling's opinion which was  
15 supposed to be an explanation of this Court's opinion that you  
16 are entitled to a declaratory judgment and an injunction when  
17 you bring a free speech case before the court regardless of  
18 whether there is a controversy at all.

19 I think you will find that as Judge Rosling goes  
20 along in his opinion, this is about the size of his conception  
21 of the status of the matter.

22 Now, of course, the Three-Judge Court went ahead and  
23 held the statute unconstitutional as a violation of the First  
24 Amendment. In doing that, Judge Rosling in his opinion knocked  
25 down the whole statute.

1           To refresh your recollection as to the statute, this  
2 is a statute which was originally passed in 1941 and at that  
3 time provided in New York that if you issued political litera-  
4 ture involving candidates in an election, you had to put the  
5 name and address of the printer or the name and address of the  
6 distributor.

7           In 1962, the statute was changed substantially to  
8 provide the name and address of the printer and the name and  
9 address of the distributor.

10          Judge Rosling in his opinion knocked down the whole  
11 statute without any discussion of the question whether the  
12 requirement which originally was imposed of name and address  
13 of the printer or the distributor would meet his conception  
14 of the First Amendment.

15          Q     Mr. Hirshowitz, is this the only New York  
16 statute that bears on that subject?

17          A     No, there are 37.

18          Q     Hear my question. Is this the only New York  
19 statute which requires on political advertisements some informa-  
20 tion as to who paid for it or who distributed it and the like?

21          A     Yes, sir.

22          Q     This is the only one?

23          A     Yes, sir.

24          There are municipal ordinances in New York City with  
25 reference to the distribution of handbills and so forth but

1 only in a commercial atmosphere.

2 Q You started to say something about 37. Were  
3 you going to say 37 States?

4 A I thought you were asking, at the time we  
5 argued this originally I said that there were 36 other states  
6 and the Federal Government that had similar statutes. I now  
7 find there are 37 States. I forgot to include the State of  
8 Indiana.

9 Judge Rosling in his opinion failed to, in any way,  
10 refer to the fact that the Federal statute had been upheld by  
11 a brother District Court in U. S. against Scott. He passed  
12 that by and he failed to refer to the significant difference  
13 between New York statutes and every other statute that I know  
14 of.

15 New York requires that the distribution must be in  
16 quantity, whereas the Federal statute or any of the other State  
17 statutes would be violated if you distributed one piece of  
18 the campaign literature or in the Federal statute, if you  
19 mailed one piece of the literature.

20 Where in New York it must be in quantities so as to  
21 indicate that this is a distribution on a wide-spread scale  
22 and not an isolated distribution.

23 In addition to that, Judge Rosling and my associate  
24 here, the Amicus referred to another aspect which is not before  
25 the court.



1           As I understand constitutional law, you discuss a  
2 statute only in the respect in which the plaintiff is involved.  
3 The plaintiff here alleged in his complaint that he wanted to  
4 distribute literature about a candidate and he said because  
5 of the statute, I am prohibited from doing that. You will  
6 find Judge Rosling, my associate and the Amicus trying to take  
7 the statute apart by pointing out that in addition to the  
8 candidate, the statute also provides or contains the require-  
9 ment that you have the name and address of the printer and  
10 distributor if you are dealing with propositions.

11           Now that is not before the Court. It is not in the  
12 complaint. It was imported by the Judge that seized upon by  
13 my friend here and also by Amicus.

14           Q     Mr. Hirshowitz, it is in the statute, that is  
15 to say the statute does relate not only to candidates for  
16 political office but also to any pamphlet or comment about a  
17 proposition or amendment to the State Constitution. Is that  
18 right?

19           A     Yes, which is involved in an election. But I  
20 was trying to point out Zwickler, the appellee here, does not  
21 say in here that he has any interest in the distribution of  
22 matter concerning propositions.

23           He says I want to give out handbills here concerning  
24 candidates. That is the setting in which the case came  
25 before the court.

1 Q You figure it makes a difference?

2 A It actually doesn't make any difference there  
3 but they do try to spin out an argument, trying to bring the  
4 First Amendment in on the theory that when you are dealing  
5 with propositions, you are already dealing with content and  
6 consequently it comes closer to a violation of the First  
7 Amendment.

8 Now it is our position, three things: In the first  
9 place, the statute has adequate legal history in New York State  
10 and throughout the country to justify the type of legislation,  
11 secondly, that there is no halo about anonymity and thirdly  
12 that in New York State as well as I believe throughout the  
13 country and in the Federal, there is no reprisal at present  
14 if you forsake anonymity.

15 As I said, the New York statute is a result in 1941,  
16 as you see in our brief of a Federal investigation by a Grand  
17 Jury impaneled by the then Attorney General Jackson that  
18 resulted in the report which recommended various changes in  
19 the Corrupt Practices Act.

20 At the same time, Senator Gillette of Iowa was  
21 interested in the same subject and he came up with a report,  
22 with a speech on the Floor of the Senate, and these two ideas  
23 germinating from two different sources resulted in three years,  
24 in 1944, in Federal legislation which as I said was upheld in  
25 U.S. against Scott.

1 Now, New York and the other States in the Union  
2 adopted and followed the recommendations of the Federal people  
3 at that time and the New York statute is a duplicate of the  
4 Federal statute except that it did not at that time go as far  
5 as the Federal statute.

6 The Federal statute says that anyone who distributes  
7 must have a name and address. We gave the alternative at that  
8 time in 1941, of the printer or the distributor. To that  
9 extent, we were not as complete in the legislation as the  
10 Federal and as I believe most of the other States are.

11 It was in 1962, that as a result of occurrences which  
12 are described in our brief and a special investigation that it  
13 was decided by the Legislature that the statute should be  
14 extended and expanded to be substantially a duplicate of the  
15 Federal statute except in the respect as I said that it still  
16 insists on quantity.

17 At that time, there was no voice raised in opposition  
18 to this expansion of statute as well as in 1941. All the  
19 political parties, the Civil Rights Committee, the City Bar  
20 Association, the Criminal Courts Committee, they all wrote  
21 letters in support, the Citizens Union which is a very forward  
22 organization in New York City wrote letters in support of this  
23 legislation. There was no opposition by the American Jewish  
24 Congress which is in Amicus here or by anybody else.

25 The only opposition put in was by the Socialist Labor

1 Party. Other than that there was no other opposition and the  
2 statute passed almost unanimously.

3 The 1941 legislative history combined with the 1962  
4 legislative history indicate that the purpose of this legis-  
5 lation is, one, the Corrupt Practices Act; two, to brand  
6 scurrilous literature; and, three, make the voter aware of who  
7 the identity of who is circulating handbills or other litera-  
8 ture with respect to a candidate is.

9 My adversary here would like to limit. He says in  
10 his brief on page 4, "I am going to limit my discussion only  
11 to the question of the statute's purpose to inhibit scurrilous  
12 and fraudulent literature," or something like that.

13 This is not correct as Judge Rosling himself was  
14 persuaded there. If that were true, if it were true as my  
15 adversary says, we would have had a case of abstention. We  
16 wouldn't have been sent back because at the original hearing  
17 before the Judge, the argument was being made that if the  
18 purpose was scurrilous or fraudulent pamphlets, that would have  
19 to be read into the statute because it is not in the statute.  
20 And that would have to be done by a New York Court.

21 And maybe that is what persuaded the Court originally  
22 to abstain. But the fact of the matter is, as we argued before  
23 this Court, that is only one of the purposes of the State  
24 statute.

25 Q Am I wrong, wasn't there in connection with the



1 last argument a suggestion or an agreement, wasn't it agreed?  
2 I have forgotten now.

3 A No, it wasn't.

4 Q Wasn't it agreed that this statute was not sub-  
5 ject to any limiting construction? Isn't that the way we  
6 treated it when it was last here and wasn't that because both  
7 of you told us that was true?

8 A I told you that. I can't speak for my adversary.  
9 I told you that as we viewed the statute it had these purposes  
10 and there was no vagueness about it there. I think I said that  
11 the Court used the language of abstention when it should have  
12 gone into the question of equity jurisdiction there.

13 As you will see from our brief there, I don't want to  
14 belabor the point, but the fact of the matter is that all of  
15 the considerations which I have referred to are in the legis-  
16 lative history.

17 You have the Grand Jury and the Federal Attorney  
18 General or Special Assistant Attorney General Milligan referring  
19 to the fact that you need this remedy because of the Corrupt  
20 Practices inasmuch as the circulation of a anonymous literature  
21 by any political group without the printing of the identity,  
22 name and address, would be a vehicle. And they found it was  
23 a vehicle for the evasion of the Corrupt Practices Act.

24 And that history you will find is in the jacket of  
25 the New York bill as adopted in 1941. That is where I acquired

1 the information.

2 In 1962, the expansion did not divorce the statute  
3 from its original legislative history. To further emphasize  
4 that fact, when New York revised the Penal Law in 1965, which  
5 Justice Brennan referred to in his opinion, effective  
6 September 1, 1967, it took the original section which was in a  
7 penal law and put it in the Corrupt Practices section of the  
8 Election Law as one of the sections detailing corrupt practices.

9 Judge Rosling, you will find in this opinion dis-  
10 cusses that as a recognition of that fact.

11 Q Could I ask you a question?

12 In view of the possible impact of this decision on  
13 the Federal statutes, have you had any communication with the  
14 Solicitor General's Office on the subject?

15 A I did, Justice Harlan. When this case was in a  
16 cert state I communicated with the Solicitor General and he  
17 wrote me back and said that he -- and called his attention to  
18 the fact that it would have an impact on the Federal statute.

19 He wrote me back and said he agreed that it would have  
20 an impact on the Federal statute. When this Court took the  
21 appeal I advised him of that fact and after some consideration  
22 he wrote me and said that they had given a lot of thought to  
23 it, but he had decided not to disagree.

24 Q Not to disagree, right.

25 Q The Federal statutes are narrower, aren't they,

1 than the New York statute in the respect that none of the  
2 Federal statutes goes beyond pamphlets, et cetera, addressed  
3 to political candidates.

4 Am I correct in that?

5 A I don't know. They are only narrower in the  
6 sense that they talk about the President, Vice President,  
7 the electors and members of Congress.

8 Q They don't relate to issues such as the propo-  
9 sition to constitutional debate?

10 A No.

11 Q Constitutional amendment.

12 A No. As I pointed out in the brief in this case  
13 here, the campaigning literature that this gentleman distributed  
14 if it had been mailed out would have been a violation of the  
15 Federal statute because it concerned a member of Congress, a  
16 category within the Federal statute.

17 There is no question that there is no risk attached  
18 anymore. In the brief there is a historical pilgrimage into  
19 history about anonymous literature which is very interesting  
20 but none of it would come within the statute here. And if it  
21 is made to make the point that there is some virtue in  
22 anonymity, it talks of an era which is long since past in this  
23 country.

24 There is no virtue any more in anonymity. I read  
25 the Columbia College Magazine just on the way to this Court

1 here and they have an article there where a student in the  
2 Columbia College gives his name, rank and serial number, says  
3 that the organization SDS said, we are in favor of sedition.  
4 We want to overthrow the country.

5 There is frightness in society. There is no virtue  
6 in anonymity. Let me say further that this Court by its  
7 decisions in New York Times against Sullivan and a number of  
8 other cases which New York State has followed with expansive  
9 zeal, because in at least two cases that I cite in our brief,  
10 New York even goes further and it says if you are the partner  
11 of a candidate running for office, then you are also that  
12 public figure that is not entitled to be protected against  
13 libel.

14 Finally in this connection as a clincher, when the  
15 New York penal law was revised which I refer to, they eliminated  
16 from the law criminal libel so that both on the civil end and  
17 on the criminal end, there is almost no risk in any statement  
18 that a person makes in a handbill or a circular.

19 So that the alleged detriment that Mr. Zwickler  
20 would suffer, if he put his name or the name of his organization  
21 on the circular with respect to Mr. Multer, the then candidate  
22 for Congress, is really nonexistent today if it was existent  
23 at the time he handed out the circular in 1964.

24 Q Are you going to distinguish the Talley?

25 A Yes, I am going to talk about Talley.



1 In the first place, in Talley, our statute would be  
2 substantially satisfied by the fact that existed in Talley  
3 because there you had the name of the committee and you had the  
4 address of the committee.

5 I think Committee for Mobilization or something like  
6 that. You had the address of the committee. What they were  
7 looking for in Talley was the principals, the name, offices  
8 or principal exponents of this organization.

9 This is absolutely missing from the New York statute.  
10 You give either the name and address of the distributor or  
11 the name and address of the organization. That is all that is  
12 required under New York statutes.

13 There is no effort to pry into anybody's privacy  
14 here. It is just an identification requirement and I think  
15 the electorate of New York City and State are entitled to that  
16 information. In the Talley case ---

17 Q You mean if it had been something like Committee  
18 to Defeat Multer, 415 Broadway, that would have satisfied it?

19 A Yes, that would have been enough. You didn't  
20 have to put down John Smith, President, nothing like that.  
21 That would satisfy the statute.

22 Because as I said the purpose is not to hurt anybody  
23 but if you read the circular, and if it is sent out by, say,  
24 the Citizens Union to take an example, you would read that in  
25 one light and if it were sent out by the SDS, for instance,

1 without being invidious, having mentioned them twice, you  
2 might read it in another light.

3 Now the argument of our adversary is, you shouldn't  
4 be entitled to do that.

5 I don't see where that follows there. I think the  
6 voter, if our goal is an intelligent electorate to participate  
7 in a democracy with such complicated decisions, I think the  
8 voters are entitled to know who is advocating what in order  
9 to be able to measure the statements that are made with respect  
10 to the particular candidate.

11 Q What is the particular State interest on which  
12 the State relies?

13 A The State interest is, as I said, in the first  
14 place is a corrupt practice to enforce the corrupt practices,  
15 secondly, to expose to the voter the identity of the person  
16 circulating the political literature so that the voter can  
17 have an opportunity to evaluate and appraise the statements  
18 made with respect to a candidate or a proposition.

19 That is the primary purpose.

20 Now, if in the course of that, it appears that some-  
21 body is making a -- which was a fact in 1956 -- there was  
22 political literature circulated in Brooklyn also with respect  
23 to a candidate for a U. S. Senator, anonymous campaign litera-  
24 ture, making derogatory statements about the same subject that  
25 was brought up by Mr. Zwickler, that he was not a fervent

1 exponent of Israel or a fervent campaigner for Israel. And  
2 in 1960, there was anonymous campaign literature circulated  
3 upstate with respect to the then candidate for President, the  
4 late John F. Kennedy, with respect to some personal matters.

5 That is the type of literature, campaign literature,  
6 that some people don't want to put their name and address to  
7 which falls in the category. It may be true. It may be untrue.  
8 But the voter is entitled to know who is circulating this  
9 literature in order to be able to appraise it.

10 Q He wouldn't know if only the name of the printer  
11 appears?

12 A The experiment with the printer didn't work  
13 out for the reason that as you may know, Justice Fortas, the  
14 Union Printers in New York City have this bug there. When  
15 the circulars were coming out, each bug says Allied Trade  
16 Printing Council or something like that and it says 301, which  
17 would identify the printing plant that was putting it out.

18 When it used to come out, you would see faintly  
19 Allied Printing, but you wouldn't catch the number.

20 Q Well, assuming that there is a substantial and  
21 appropriate purpose for the New York Legislature in enacting  
22 this statute, making this requirement, I suppose the problem  
23 arises because on the other hand there is at least a substantial  
24 body of opinion to the effect that there ought to be the  
25 opportunity for invective with immunity in a political campaign.

1           A     I don't think in any way the statute -- the  
2 statute doesn't in any way affect the campaign.

3           Q     It affects the immunity from prosecution or  
4 libel.

5           A     I don't know that it affects immunity.

6           Q     The immunity from prosecution of somebody that  
7 didn't like what you said about them.

8           A     Only in this particular case, sir. But other-  
9 wise you could put down any committee which is defined in the  
10 election law as three or more people.

11          Q     It would have to be a bona fide committee, I  
12 would assume. You don't read this statute as meaning that you  
13 can just invent a fictitious committee, do you? Can you  
14 satisfy this statute by inventing the name of a fictitious  
15 nonexistent committee and putting that on your handbill?

16          A     I don't know. I can't answer that. But I know  
17 that the statute is intended -- I assume that the statute is  
18 intended to recognize any committee. You don't have to pass  
19 any registration or license test.

20          Q     But I assume that it is not a foolish statute  
21 that would allow people to invent a name and stick it on there.

22          A     If you issue the circulars under the name of  
23 the ABC Committee in connection with the election campaign, you  
24 would have to file a report, if you want to live up to the law.  
25 So to find out whether it is a real committee or a fake



1 committee, and secondly, the mere fact it had the name ABC  
2 Committee with the literature would at least achieve one of  
3 the purposes of the statute because a voter would be able to  
4 say, "Who is this committee? I don't know this committee so  
5 I will appraise the information about this candidate or  
6 proposition properly."

7 Q If I am to publish some literature -- if I am  
8 publishing a piece of political literature, I should sign my  
9 own name, not somebody else's?

10 A Yes, you can sign your own name.

11 Q Yes, but I can't make up a name for myself, can  
12 I?

13 A No, you can't make up a name. But Justice  
14 Fortas says supposing it is a made up name. Well, inasmuch as  
15 you don't have to register or get a license, there would be  
16 no way of checking on that except that as I pointed out to  
17 Justice Fortas, at the appropriate time you would have to file  
18 a campaign report.

19 In that way it would appear. So whether you are a  
20 legitimate committee or just made up a name.

21 I submit to the Court that the disposition by the  
22 Three-Judge Court should be reversed.

23 Thank you.

24 MR. CHIEF JUSTICE WARREN: Mr. Redfield.  
25

1 ORAL ARGUMENT OF EMANUEL REDFIELD, ESQ.

2 ON BEHALF OF APPELLEE

3 MR. REDFIELD: Mr. Chief Justice, members of the  
4 Court.

5 Before I reach the statute itself, I would like to  
6 make a few remarks with respect to the facts of this case so  
7 that there should be some clarity.

8 It seems to be confused both in the brief and in the  
9 oral argument of the appellant.

10 First of all, this is an appeal from a final judgment  
11 of the District Court. It is not an appeal from Judge Rosling  
12 or anything of the sort. It is a Three-Judge Court who  
13 rendered a final judgment. Now I say it is final because of  
14 what occurred here.

15 At the preliminary stages when I made a motion for  
16 a temporary injunction they counted it as a motion to dismiss.  
17 After hearing, June 9, 1966, the counsel stipulated because  
18 it was obvious to both of us that there were no issues of fact  
19 involved in this case that the court treat that application  
20 for temporary injunction as if it were the final hearing for  
21 final judgment.

22 And the statement to that effect appears in the  
23 record on page 25.

24 Now, in the judgment itself, the Court said, "And  
25 the parties having stipulated at the hearing on June 9, 1966,

1 that the court treat plaintiff's motion as one for final judg-  
2 ment," and then at the last oral argument in this Court, it  
3 was conceded by my opponent on questioning by Chief Justice  
4 and Justice Black that there were no issues of fact involved  
5 here.

6 In fact, there couldn't be any issues. Most of the  
7 matters were those of public record. Therefore, under such a  
8 concession and because of the stipulation in the District Court,  
9 we have to turn to the complaint which says that the plaintiff  
10 desires and intends to distribute in the Borough of Brooklyn  
11 at the place where he had previously done -- at various places  
12 in said counties, the anonymous leaflet herein described and  
13 similar anonymous leaflets all prepared by and at the instance  
14 of a person other than the plaintiff.

15 And so on. I don't want to take the limited time I  
16 have here, your Honor, to go into that.

17 It goes on further to say that the defendant Koota  
18 previously prosecuted the plaintiff and was a diligent and  
19 conscientious public officer and pursuant to his duties intends  
20 to again prosecute the plaintiff.

21 Because of the previous prosecution of the plaintiff  
22 in making the distribution of the leaflet and because of the  
23 prosecution of him, plaintiff is in fear of exercising his  
24 right to make distributions as aforesaid and is in danger of  
25 again being prosecuted, therefore, and unless the right of

1 expression is declared by this court without submitting himself  
2 to the penalties of the statute.

3 This concession, this admission there was no answer  
4 ever filed controverting these allegations should put the facts  
5 in the proper light.

6 Q Now, Mr. Redfield, since our decision in Zwickler  
7 against Koota, the Congressman Multer has gone on the Bench,  
8 hasn't he?

9 A Yes, but this was not directed to Multer itself.

10 Q I know, but that is what I want to ask you  
11 about. Now the position is that Mr. Zwickler says that his  
12 burning desire to distribute anonymous literature is not con-  
13 fined to former Congressman Multer but it relates to unnamed,  
14 unspecified persons who may in the future run for office.

15 Is that the case in controversy?

16 A Yes, and he also says that he wants to use even  
17 this particular pamphlet to show what the state of the political  
18 world is.

19 Q That particular pamphlet that was before us in  
20 Zwickler against Koota related to the then Congressman Multer,  
21 didn't it?

22 A It spoke of him.

23 Q I don't suppose the distribution of a pamphlet  
24 about Mr. Multer, now Judge Multer, would come within the  
25 statute anyway. He is on the Bench. He is not going to run

1 for political office, of course.

2 A Yes, but this pamphlet doesn't say don't vote  
3 for Multer or anything like that. It is a political tract.

4 Q But it relates to Congressman Multer.

5 A It could say Thomas Jefferson on it, too.

6 Q It doesn't. He isn't running for office which  
7 was a statutory requirement, as I understand it, isn't it?

8 A It is a campaign piece of political literature,  
9 too.

10 Q It has to be in a political campaign, somebody  
11 running for office, isn't that right?

12 A Right.

13 Q Let us just take that down if you don't mind.

14 A Yes.

15 Q Unless it relates to a campaign in which some-  
16 body is running to be elected to office, it does not come within  
17 this statute, is that right?

18 A Well, that is only one part of the statute.  
19 You are only choosing one part. It refers to many other  
20 situations. It refers to party councils for one.

21 Q It refers to elections, doesn't it, except for  
22 this somewhat ambiguous reference to propositions for amending  
23 the Constitution?

24 A It refers to the election of public officers,  
25 party officials, candidates for nominations ---



1 Q But elections?

2 A Party positions, yes.

3 Q And the only person that was involved in the  
4 original case, the only person that there has been any dis-  
5 closure as to whom there has been any disclosure that Mr. Zwickler  
6 wants to distribute anonymous pamphlets prepared by somebody  
7 else allegedly is Mr. Multer who is now on the Bench and there  
8 is no allegation that he is about to run for any office, party  
9 or otherwise. Is that right?

10 A That is right.

11 Q That is a problem about whether there is here  
12 a justiciable controversy, isn't it?

13 A That is what is sought to be raised. But I  
14 don't think there is merit to that. Because if you take the  
15 allegations of the amended complaint which says that the said  
16 distribution is intended to be made at any time during the  
17 election campaign of 1966, and in subsequent election campaigns  
18 or in connection with any election of party officials, nomi-  
19 nations, to public office and party positions, that may occur  
20 subsequent to said election campaign of 1966.

21 Q What you are really seeking here is a ruling in  
22 the abstract?

23 A No, sir, it is not in the abstract because this  
24 man wishes to use this document in connection with other cam-  
25 paign situations such as he alleges in the complaint. The

1 only reason he has not done so, he has been thwarted. The  
2 fact is that he wanted to use it in this past election and it  
3 was only because of Justice Harlan's stay that was granted to  
4 the appellant that he couldn't use it.

5 I should also point out the fact that if there were  
6 no vitality to this case, I don't think there would have been  
7 any necessity for a stay. The fact is that they came in crying  
8 for a stay shows that they were afraid of what Zwickler might  
9 do. That alone should satisfy the court.

10 Q That is not what they said ---

11 A He suggested in the complaint that he was in-  
12 tending to do it. That was before the Court.

13 Q It would have been rather confusing to the  
14 voters, wouldn't it, to attack somebody who wasn't running for  
15 office, who had a different job?

16 A He wasn't attacking Multer. He was going to  
17 use this thing to show, for example, what those people could  
18 do, the Democrats for example.

19 As long as we are on that question, I was a little  
20 out of order of my argument, but as long as you bring that up,  
21 I also would like to call your attention to two of your recent  
22 decisions here within the last few months, the Carroll case  
23 and the Epperson case.

24 In the Epperson case in which Justice Fortas wrote  
25 the decision, the opinion of the court rather, the person who

1 sought to get a ruling as to the validity of the evolution law  
2 of Arkansas and had left his job, or her job, had moved out of  
3 the State, and also it was shown that there were no prosecu-  
4 tions under this statute.

5 Yet, Mr. Justice Fortas in his opinion says, well,  
6 the case is before us, and we should review it.

7 In the Carroll case, an injunction had been granted  
8 for ten days and yet although the injunction had expired  
9 almost two years, nevertheless this court granted review.

10 Q With regard to the right to anonymity ---

11 A The right to anonymity is, I should say, a form  
12 of expression. I wouldn't say that where the right is an  
13 anonymity, it would be like saying what right is there of  
14 anybody to talk in this world or to express themselves in this  
15 world.

16 The fact is that anonymity has existed for centuries  
17 and centuries in all phases of the literature and expression.  
18 Well, if we don't want to go back in history, I will go back  
19 when I get to it, but our daily life consists of anonymous  
20 expression.

21 You walk along the street and you see picket signs,  
22 down with so and so, dump so and so and nobody signs his name  
23 to those things. There are scrawls all over walls concerning  
24 political candidates and no requirement is made that anybody  
25 sign his name to scrawls.

1           Anyone can grouch about political life and political  
2 personages and criticize but never having to identify himself.

3           Then that leads me to the case of Thomas against  
4 Collins in which a person sought to speak in public ---

5           Q     This is part of the natural law?

6           A     The natural law? Well, I don't know about the  
7 natural law, Judge, but I know it is a natural person.

8           Q     You pointed out that as written a person has a  
9 right to anonymity?

10          A     Well, he has a right to express himself. That  
11 is what I say. It is part of it. It is like saying to me,  
12 what right have I got to make spaces between words in ancient  
13 literature, if I recall.

14          Well, there were no spaces between words. I want to  
15 space my words. I want to make paragraphs. This is the manner  
16 I like to write in. I like to write without signing my name  
17 and I don't see why anybody, any Government should have a right  
18 to say that I must sign my name to anything that I write.

19          The history is filled with anonymous literature  
20 which extends back to the beginnings of this country and before  
21 that and you will find before the Constitution, Benjamin  
22 Franklin wrote under about 50 pseudonyms.

23          Q     Mr. Redfield, suppose this statute required no  
24 more than an endorsement paid for by whoever paid for it.  
25 What would you do then?

1 A I don't think one has to identify himself.

2 Q I guess you concede with me that a state that

3 has a Corrupt Practices Act and uses this as a device to  
4 enforce the limitations on payments for political advertise-  
5 ments, would at least have a state interest in wanting to have  
6 it appeared who had paid for a particular advertisement.

7 Would you concede that much? That it would have a  
8 state interest?

9 A Not in that respect, no. I don't see why  
10 anonymity should be placed on that ground because they want  
11 to determine how the expenditures were made for a campaign  
12 literature.

13 Q Now wait a minute. That isn't what he asked you.

14 A Yes, sir, I think that is what he said.

15 Q I don't think it was. I think all I asked you  
16 was, what would be your view if this statute merely required  
17 an endorsement disclosing who paid for the particular adver-  
18 tisement. That is my question.

19 I think some of these taxes of these other states  
20 are that limited, aren't they?

21 Q What does the Federal statute say?

22 A I am not familiar with the Federal statute,  
23 your Honor, just in broad outline.

24 I would off-hand, I haven't given it much thought  
25 but since it is an interference with the expression, I would



1 say it would have nothing to do -- it should have no overriding.

2 Q In other words, you don't think even so limited,  
3 there might be a compelling state interest which would justify  
4 it notwithstanding that it would have to be ---

5 A Because the compelling state interest could be  
6 determined in another fashion. That is the trouble with this  
7 statute, too.

8 Q You mean there is some other means?

9 A There is some other means of ascertaining it.

10 Q What would the other means be?

11 A I don't know. I am not prepared to say that. I  
12 will say this much: That whether or not a piece of literature  
13 is anonymous or not anonymous is not determinative of how much  
14 is spent for it or who spent it.

15 Q I thought you would answer me that is my case  
16 because this statute isn't that so limited.

17 A Well, that I would always be prepared to say  
18 but I am not trying to duck away from your question.

19 Q Suppose Mr. Zwickler had been subpoenaed in a  
20 civil suit or a criminal prosecution against John Doe and he  
21 had been asked in court to disclose the name of the author of  
22 that pamphlet, whether it was a libel action or whatever it  
23 might be.

24 Would it be a violation of the Federal Constitution  
25 that would compel him to answer?

1           A     It would all depend on the context of the situ-  
2     ation. In other words, if he is involved, let us assume, in  
3     some -- he might become incriminated if he was just to ---

4           Q     I am not talking about that. I am talking about  
5     the First Amendment.

6           A     The First Amendment. Well, of course, I can say  
7     that it is not this case. But I will say this much: I believe  
8     he could assert his First Amendment rights under that. Of  
9     course, I think the man has a right to speak without being  
10    questioned, why or who is the author of his literature.

11          Q     What about the opinion that said that the  
12    experience of John Udall had as much to do with the passage of  
13    that amendment as anything. That is the self-incrimination ---  
14    John Udall was tried so as he would not tell what he knew about  
15    the publication of a book.

16                He defied this commission and would not tell them.  
17    They sentenced him to death. Our cases have referred to that  
18    as one of the reasons of the freedom of speech and the privilege  
19    of not being compelled to incriminate yourself.

20                It might be worth your reading.

21          A     Yes. I think the case of John Lillyburn is very  
22    close to that, too.

23          Q     They are similar. But John Udall was the one  
24    that hit it exactly in his trial. And he has been referred to.  
25    The reason, partially, by our Bill of Rights.

1           A     I don't know what my time situation is here.

2           Q     The publication was anonymous and he wouldn't  
3 tell what it was.

4           MR. CHIEF JUSTICE WARREN: I think you have about  
5 ten minutes.

6           MR. REDFIELD: I would just like to come back to this  
7 point about trying to get at -- it seems that the appellant in  
8 this whole litigation has shifted its position from time to  
9 time so that I had to sort of stalk him all along to make sure  
10 that I would cover all of his contentions at different times.

11           For example, at the early stages, he submitted an  
12 affidavit saying that this statute is limited only to scurrilous  
13 literature and then switched that it covered all literature.  
14 So I briefed this thing and argued not any basis but I took  
15 the most difficult situation first and that was the one of  
16 scurrilous literature.

17           As to what overriding State interest is involved here,  
18 assuming you wish to balance an overriding State interest  
19 against the First Amendment, I don't know of anything that  
20 has been offered or said in the Appellant's brief which shows  
21 any great need or great emergency or anything of eminent  
22 collapse to society or Government if this law were not on the  
23 books.

24           At one stage of the litigation it was said that the  
25 overriding interest was that there was a need of locating the

1 scurrilous offender. I don't think that this is of such great  
2 interest to society that the First Amendment has to be  
3 throttled.

4 Then you heard it said today that there is a right to  
5 know. I don't know what that means, the right to know. That  
6 makes the whole question. That is what we are trying to  
7 determine, whether or not a reader has to know who is the  
8 writer.

9 I submit, your Honors, that the question of what is  
10 true or untrue is determined by what is said and not by what  
11 the author says.

12 Then another overriding factor that has been tendered  
13 is that there should be an opportunity to answer back. I  
14 don't think that is necessary, that literature has to be not  
15 anonymous in order to answer back. You can answer back  
16 anybody.

17 If anybody wishes to answer back not anonymous lit-  
18 erature, if he thinks it is that important, why it is up to  
19 him to do it if he wishes to.

20 Then lastly, one of the things tendered here is this  
21 expenditure question. We want to find out how the money is  
22 being spent.

23 Well, I think that could be determined whether or not  
24 the literature ---

25 Q I didn't think it was how it was being spent.

1 I thought it had reference to whether the limitations on  
2 expenditures by particular persons, corporations, that sort of  
3 thing, that it was a way of policing those limitations. I  
4 thought that was what the argument was.

5 A Why should that be such an overriding considera-  
6 tion to throttle First Amendment considerations when you can  
7 have a statute directly at that saying that the party has to  
8 submit its books to show expenditures.

9 Why say you can't publish generally?

10 Q Mr. Redfield, if we agree with you, it would  
11 follow that a Federal statute or a regulation of the FCC  
12 require the people in a political campaign to identify the  
13 source of statements or advertisements on television during an  
14 election campaign; that such a statute or regulation would be  
15 unconstitutional as violative of the First Amendment?

16 A I don't think with respect to this that that  
17 would necessarily follow because you are limiting it. That is  
18 not this case.

19 Q Why not?

20 A I am ---

21 Q Mr. Zwickler is not involved ---

22 A No, I am not talking about Zwickler. I am  
23 talking about it being that that is a different situation from  
24 this one.

25 Q Why?



1           A     Because Zwicker is not -- the statute does not  
2 refer to any compulsory disclosure of who is financing the  
3 pamphlet. It merely says who is the author of the pamphlet.

4           Q     Suppose the regulation said or the statute said  
5 that on television you want to attack a candidate during an  
6 election campaign on television. Then the person who is the  
7 author of a sponsor of a statement has to be identified. That  
8 would be unconstitutional?

9           A     Then that would be similar to this. That  
10 situation would, but not the one about finances.

11          Q     But somehow you distinguish the financing,  
12 who paid for it.

13          A     Yes.

14                Not that I am prepared at this moment to argue that  
15 but I am making the distinction in that one has to do with who  
16 is paying for it and the other one has to do with who is the  
17 author of these remarks.

18                I don't want to take up the Court's time. I think  
19 I have covered everything. I have assumed up to this point  
20 that we were dealing with scurrilous remarks only.

21          Q     Were you defending the injunction?

22          A     Oh, the injunction, I would say first of all  
23 they haven't shown ---

24          Q     No, no. The Three-Judge Court gave an injunction  
25 as well as a declaratory judgment.

1 A Yes.

2 Q What is the support for the injunction?

3 A The support for it, I assume that the Court  
4 felt ---

5 Q There wasn't any imminent or pending or threatened  
6 criminal prosecution of Zwickler was there?

7 A The Court felt what Zwickler has been subjected  
8 to up to now might be repeated. I don't think there was any  
9 harm in putting it in as incidental relief to a declaratory  
10 judgment. It is quite commonplace.

11 Q What about Douglas and Jeannette in that  
12 connection? I thought we dealt with that in the last opinion.

13 A Yes. I thought so far as this case was con-  
14 cerned, incidental injunctive relief granted in connection  
15 with the ---

16 Q But I thought the last opinion tried to dis-  
17 tinguish between when one is entitled to a declaratory judgment  
18 and when even though one is, is not entitled to an injunction,  
19 didn't it?

20 A I don't think the latter would follow from the  
21 other. I thought the latter referred to merely an action  
22 for an injunction. But if an injunctive relief is granted as  
23 incidental to declaratory relief, I see no harm in it.

24 MR. CHIEF JUSTICE WARREN: The court is adjourned.

25 (Whereupon, at 2:45 p.m. the Court recessed, to  
reconvene at 10 a.m. Monday, January 20, 1969.)