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In the

Supreme Court of the United States

SOCIALIST LABOR PARTY, et al., Appellants,	)	
vs.	)	No. 70-21
JOHN J. GILLIGAN, Governor, State of Ohio, et al., Appellees.	)	

Washington, D. C.
March 23, 1972

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v.	:	No. 70-21
JOHN J. GILLIGAN, Governor, State of Ohio, et al., Appellees.	:	

Washington, D. C.,

Thursday, March 23, 1972.

The above-entitled matter came on for argument at 11:21 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

SANFORD JAY ROSEN, ESQ., American Civil Liberties Union Foundation, 156 Fifth Avenue, New York, New York 10010; for the Appellants.

DONALD J. GUITTAR, ESQ., Assistant Attorney General of Ohio, State House Annex, Columbus, Ohio 43215; for the Appellees.

C O N T E N T S

[Afternoon session - pg. 27]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 70-21, Socialist Labor Party and others against Gilligan.

Mr. Rosen, you may proceed when you're ready.

ORAL ARGUMENT OF SANFORD JAY ROSEN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. ROSEN: Mr. Chief Justice, and may it please the Court:

This case involves the constitutionality of Ohio Revised Code, Section 3517.07, which imposes political tests on access to the ballot in Ohio.

The statute is set out in the Appendix at pages 12 and 13.

The statute precludes from the ballot in Ohio election, and if I may quote briefly from the statute, "Any political party or group which advocates, either directly or indirectly, the overthrow, by force or violence, of our local, state, or national government or which carries on a program of sedition or treason by radio, speech, or press or which has in any manner any connection with any foreign government or power or which in any manner has any connection with any group or organization so connected or so advocating the overthrow, by force or violence, of' these various governments.

Exempted from this requirement of the statute, that

the party, to get on the ballot, actually meets these tests, are: parties and groups that have a place on the ballot in each national and gubernatorial election in Ohio since 1900. There are only two parties that meet that test, of course those are the Democratic and Republican parties.

Under the statute to secure a ballot position --

Q Well, you're certainly not suggesting that in the absence of the exception they couldn't get on the ballot in this State?

MR. ROSEN: Of course not, Your Honor. I'm implying an argument that I'll get to somewhat later, which is an equal protection argument. That by exempting any parties from this requirement, the State is drawing an invidious classification. And I will come to that argument, if I may, Your Honor.

But under the statute, parties that do have to meet these tests in fact have to submit an affidavit, signed by ten members of the party or group, three of whom are to be executive officers of the party.

After the affidavit, in the form of the statute, is executed and filed with the secretary of state, the secretary of state is required to conduct his own investigation of the facts appearing on the affidavit, and to make his own determination of whether the party or group should be on the ballot.

Now, the plaintiffs brought suit in 1970, challenging

this provision as well as any number of other Ohio provisions, but those provisions which were in the litigation have all been washed out of the suit by subsequent action of the Legislature of Ohio.

We sought injunctive and declaratory relief from a three-judge statutory court, and May 5, 1970, the district court declared the provision in the statute of Ohio unconstitutional on its face; but reading the controlling and only decision of the Ohio Supreme Court on this statute, the State ex rel. Beck v. Hummel case, to narrow the statute. The Court upheld the statute as construed, and thus the Court held that the statute now means -- and this is quoted in the Appendix at page 62 -- that an oath is required that (1) the party is not engaged in an attempt to overthrow the government by force or violence, (2) the party does not carry on a program of sedition or treason as defined by the criminal law and (3) the party is not knowingly associated with a group attempting to overthrow the government by force or violence.

Plaintiffs appealed from the denial of their injunction, upholding the statute as construed; defendants cross-appealed from so much of the decision of the three-judge district court, holding the statute unconstitutional on its face.

Plaintiffs request this Court to reverse and remand with directions to the district court to declare the entire

statute unconstitutional and to enjoin its enforcement in the future.

There are several reasons why this statute is unconstitutional. Some of these reasons go to the statute on its face, some go to the statute as construed and interpreted by the district court, with the assistance of the Ohio Supreme Court, and some relate to both.

It's the position of plaintiff that the starting point for analysis of this statute is an appreciation of the importance of the right to vote and to gain access to the ballot.

This Court, in numerous decisions over the last decade, has held, for example as in Westbury vs. Sanders, that no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.

Other rights, even the most basic, are illusory if the right to vote is undermined.

It's our first position in this case, Your Honors, that there is an absolute right on the part of the electorate to vote for candidates for public office without the State interposing any kind of a screen between that right to vote, and access to the ballot.

Q This wasn't a three-judge district court, was it?

MR. ROSEN: Yes, it was, Your Honor. It was a three-judge court. If you recall, the case did come up as one of two consolidated cases involving a broad-gauged attack to a number of Ohio election provisions. And, as I suggested, most of those provisions have been mooted out of the case by legislative action.

Q By legislative action.

MR. ROSEN: Right.

Q Right.

MR. ROSEN: And this is the only provision that appears to remain.

Okay.

We think that there is a very substantial First Amendment component to the right to vote, and we believe that this Court has recognized that substantial First Amendment component.

In the predecessor to this case, Williams vs. Rhodes, for example, the decision by Justice Black on equal protection grounds started off from an appreciation of the fact that the right of individuals to associate for advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively is a fundamental right and was the issue involved in that particular case. And, indeed, remains the issue in this case.

For our first position on this law is that Ohio has no right to interpose any kind of a political test for the vote itself, and for access to the ballot. The question of what Ohio may do in terms of qualifying elected officials when it comes time for them to take their oath of office is not a question before this Court. We're not even at that point.

So we would submit that not even the oath of office contemplated in Article VI of the Constitution of the United States is appropriate.

Now, on the other hand, should the Court be reticent about taking this particular step in this case, our second position is that Article VI of the Constitution, which provides for a constitutional oath of office for all elected officials in the United States, read together with Amendment No. 1, has to mean that at most, in terms of political credentials, speech and association credentials of candidates for public office, parties on the ballot. All that can be required is a test basically in the form of an Article VI affidavit or oath of office.

We believe that this, although it is not the holding of the Court in the case of Bond vs. Floyd, involving access to the legislature in the State of Georgia, and it's not of course the holding of the case in this Court's decisions in Powell vs. McCormack, involving the Court's ability to review a determination by the Congress that a member should be refused

his seat, and holding that the House is limited in its consideration only to those constitutional requisites which the member must meet, and which are set forth.

These two decisions do imply very strongly that the most that the State may require is the Article VI type of test.

We would refer the Court as well to a number of State court decisions, the leading one of which, although dealing with State constitutional law, is Embery vs. Marsh. It's not cited in our brief, unfortunately. It's a decision of Chief Justice Vanderbilt of the New Jersey Supreme Court, and its reference is 71 Atlantic 2d 352, 3 N.J. 578, in which Chief Justice Vanderbilt, faced with a State law of New Jersey, which added to the qualifications for ballot access and for office as an elected official, things that were not contemplated in the constitutional oath provided under Federal and State Constitutions.

The Court ruled quite clearly that the constitutional oath requirement brooked no additions whatsoever.

On this point, the Court might also refer to Shupp vs. Simpson, which is cited in our brief, the Maryland Court of Appeals decision, although it disavowed the Embery case so far as State offices are concerned, it clearly accepted the Embery rationale on a preemption basis so far as federal elected officers are concerned.

Now, in addition to our first two points, we have a number which are perhaps more fully briefed in our brief. The first of -- our third point on the unconstitutionality of this Ohio provisions pertains to the statute's invasion of the right to political association. The statute doesn't even screen candidates, as such. It's not a requirement that a candidate execute an oath, which was precisely the question before this Court in the Gerende case, of which the district court below made much. That's not the question in this case.

What we have here is a statute which presumes to screen political congeries, associations, groups and parties and keep them off of the ballot.

We submit that cases like Gibson vs. Florida Legislative Investigating Committee, NAACP v. Alabama would suggest that such a statute is at least constitutionally -- presumptively unconstitutional.

In addition, since the statute requires that ten members of the party, whether candidates or not, only three of whom are to be officers of the party, must execute the affidavit, there's a direct invasion of the associational rights of those individuals, as indicated in the Shelton and Bates decisions, and the decisions involving the Subversive Activities Control Act, and the registration requirements for Communist-action Organizations; Albertson vs. CP, and the like.

This statute, in addition, is unconstitutionally

overbroad. It's perfectly clear the statute on its face, if all the Court had before it was the statutory language, is unconstitutionally broad.

We fully brief that point, and I won't go over it, the statute on its face in terms of the overbreadth.

The State does suggest that the statute is still constitutional on its face, but the district court below certainly held to the contrary.

We submit that even if construed by the Supreme Court of Ohio in the Beck case, the statute is unconstitutionally broad, and, indeed, the district court below misread the Supreme Court of Ohio's decision.

It's our position that the Supreme Court of Ohio, in narrowing the statute, only narrowed it to the point of drawing a distinction between violence or engaging in violence, but including in that category mere advocacy of violence or violent overthrow; and, on the other hand, peaceable change, as through use of the amendment process.

A careful reading of the decision of the Supreme Court of Ohio, I think, will make that clear. In addition, I think that, although there are no other Ohio Supreme Court decisions on point, there are a number of Ohio lower court decisions dealing with analogous statutes which seem to indicate, as well, that their understanding of the law in Ohio was that the distinction being drawn is between violence,

including mere advocacy, and peaceable change.

Even as interpreted by the district court below, however, the statute remains unconstitutionally broad. Again, to a large extent, this point is taken up in our argument; I'll just mention the two most notable aspects of the overbreadth of the statute as construed by the district court.

First, the district court, in its narrowing construction of statutes, speaks of the party knowingly associated, or associating with a group attempting to overthrow government by force or violence. We submit that the use of the term "knowingly associated" is too open-ended. Even though this term itself is too open-ended, in addition we submit that the criterion established by the district court does not take account of the numerous decisions of this Court, which hold that mere knowing association, membership in, or participation in a group which is engaged in or advocating violent overthrow is not enough. There must be specific intent on the part of the person or, in this case, party associating to further or fulfill the unlawful goals of the organization which is engaged in the unlawful act or advocacy.

Q Then, I gather, Mr. Rosen, you extend your overbreadth argument to either elements one or two of the district court's construction?

MR. ROSEN: We don't extend the overbreadth argument as such. I do extend the next point, which of course is a

vagueness point, to points one and two.

I must say, to the extent that I understand what No. 1 means, the party is not engaged in an attempt to overthrow the government by force or violence, it would be difficult for us to argue that that's overbroad, assuming that the inquiry can be made or this investigation can be made, and we don't concede that.

It seems a silly thing to ask somebody to make an affidavit about, since it's speaking of the immediate present and this instant, and has no reference to future behavior or activity; but I suppose we couldn't say it's overbroad. If anything, it's incredibly narrow.

However, we do think that there may be some vagaries involved in that particular language. Less in that point one, except as read with the statute itself, than in the point two. The party does not carry on a program of sedition or treason, as defined by the criminal law.

Well, I suppose we know what treason means under the criminal law. I assume, and I think the Court would assume, that treason would be limited by Article III of the Constitution to mean making war on the United States or any of them, and adhering -- or adhering to their enemies, proven, according to the two-witness rule, or open confession.

And, indeed, I believe there is an Ohio statute on treason, though I don't know that it has ever been enforced.

However, there is no sedition law in Ohio. The closest thing to a sedition law in Ohio was the criminal Syndicalism Act, which this Court declared was unconstitutional in Brandenburg vs. Ohio. There is no referrent in Ohio jurisprudence at all for a meaning for the term "sedition". And of course this Court has recognized, and I have reference to your language, Mr. Justice Brennan, on the difficulty the Court has with the use of those two words, "sedition" and "treason", and the difficulty of defining them.

But that is quoted in the brief, and we would rest on that proposition, so far as the construction by the district court is concerned. These are the primary vague provisions in this newly construed statute. But again we don't agree that the district court was correct in its construction, in light of the Supreme Court of Ohio's view.

We think it's perfectly clear, further, that the vagueness that's found in the statute and the overbreadth is incredibly magnified by the deprivations of due process of law in a procedural sense that are found in the statute. First, there's a burden of going forward, which is placed immediately upon the party.

This statute requires that an affidavit be submitted on behalf of the political party or group. It seems to us that that kind of a requirement is interdicted by this Court's decision in Speiser v. Randall, once you're in the First

Amendment area. Further, the affidavit isn't enough. It's not even presumptively dispositive of the facts of not being subversive or not fitting within the statute. The statute provides that the secretary of state shall undertake an independent investigation, and the evidence of the kind of investigation that the secretary of state is likely to conduct is presented in the opinion of the Supreme Court of Ohio, in the Beck v. Hummel case.

It was cursory and anti-First Amendment at best, and so the Supreme Court of Ohio itself found in that particular case.

In the course of the investigation, the Supreme Court of Ohio ruled that the secretary of state need provide no hearing, none whatsoever. He can do his own ex parte investigation. A clear offense to procedural due process.

And, further, the Supreme Court of Ohio ruled that once he made his findings and certified that the party or group should not have access to the ballot, and should not be placed upon the ballot, the Supreme Court ruled they would review, they and the other Ohio courts review according to a test of substantial evidence; whether there is substantial evidence, I assume the court meant, on the record as a whole to support the decision of the secretary of state.

Although the test may not be even as generous to the party or group as the substantial-evidence rule, because the

court also speaks about reviewing according to a determination whether they will overrule the secretary of state, only if the finding, his finding is manifestly against the weight of the evidence.

Much too stringent an evidentiary test under this Court's decision in Speiser v. Randall, Connell vs. Higginbotham, and Law Students Association vs. Wadman.

So, again, another constitutional infirmity in this scheme.

And, finally, to return to the point that Justice Stewart brought out in his question, we think all of these defects are further magnified by the fact that there is an exemption for parties with a great deal of continuous longevity on the ballot in the State of Ohio, those two parties of course being the Democrats and Republicans.

We don't imply at this time that either of those parties would have difficulty securing a ballot position under the tests of this statute, even as construed, assuming we quite understand what they are.

What we do mean to imply is your observation, Justice Stewart, in Jenness vs. Fortson, where you said: time after time established political parties at local, state, and national levels have, while retaining their old labels, changed ideological direction because of influence and leadership of those with unorthodox or "radical" views.

The history of these United States is replete with examples of changes of ideological direction on the part of political parties in the United States. I just reviewed a document that had been prepared by the former secretary of state of Ohio, on the election experience in Ohio over a long period of time, from the beginning of the Republic to the present. I counted 37 separate political parties, of whom I know at least 10 engaged in one type of metamorphosis or another, of which several were more or less revolutionary for their time, including the abolitionist party.

Presumably, that party might not be able to secure ballot position in Ohio today, if it attempted to go on the ballot.

Now, on the basis of these various defects, it is the appellants' position that the decision of the court below should be reversed, the case remanded, and with instructions to enjoin the operation of the statute.

I'd like to reserve the rest for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Rosen.

Mr. Guittar.

ORAL ARGUMENT OF DONALD J. GUITTAR, ESQ.,

ON BEHALF OF THE APPELLEES

MR. GUITTAR: Mr. Chief Justice, and may it please the Court:

I would like to answer the first objection which has been raised, which is a question of the violation of due process, procedural due process.

I think if the Court will examine the Ohio case of Beck vs. Hummel, you will find out that the Ohio court and the Ohio law does not run afoul of the previous decisions of this Court, such as Speiser, for this reason: The secretary of state of the State of Ohio makes a determination on the basis of the affidavit. It is true that that is a unilateral determination.

The next step is, he then refuses to certify and put the party on the ballot.

The next step, then, is that the person, or I mean the party must go to court. At this point, and in the Beck case the Ohio Supreme Court held that the affidavit has a presumption in its favor of good faith and truth and that the secretary of state in answering that has got to overcome that presumption. And, further, that the secretary of state has got to come forward with substantial evidence.

So this is not the usual situation, this is not the situation which the Court had before it such as in the Speiser case, in which the entire burden of overturning an adverse administrative determination was put on the part of the taxpayer.

Q Now, how did this case arise? That is, how and

why is this a case or controversy? Did somebody refuse to put these people on the ballot because of a lack in the affidavit?

MR. GUITTAR: No, Mr. Justice Stewart. The Socialist Labor Party refused to execute the affidavit. If you'll examine the pleadings, they felt that they had just pled as their third cause of action, just the alleged confict, the statute, and then they pled the conflict.

Unfortunately, I cannot give you the fullest factual answer that I would like to, Mr. Justice Stewart, because I was not present at the time, or at the trial. But --

Q This is the third cause of action, isn't it, to you, beginning on page 12 of the Appendix?

MR. GUITTAR: That's correct.

Q I have it right. And they recite, they quote the language of the statute, and they say it's unconstitutional, then they say, in paragraph 21, that unless they are granted relief they will be irreparably injured; but they don't say how or why. Do they?

MR. GUITTAR: No, they do not.

Q I wondered if they refused to file an affidavit and were, for that reason, denied a place on the ballot? Or filed an affidavit, and that the secretary of state found it deficient?

MR. GUITTAR: It's my understanding, based upon a

transcription which I had made of the oral argument, from the statement of the attorney for the Socialist Labor Party, that they had refused to execute the affidavit.

Q I don't think they allege that, do they?

MR. GUITTAR: No, it is not alleged in the petition. The case was --

Q So it's kind of a search and destroy complaint. Here's a statute on the --

MR. GUITTAR: That's right.

Q -- books of the Ohio General Code, and we don't like it; so we -- that's about what they said, is it not?

MR. GUITTAR: That's correct.

Q But they say more than that, they say it's unconstitutional.

MR. GUITTAR: That's right, then they --

Q But they don't say how they're harmed.

MR. GUITTAR: No, they do not.

Q The case was decided on summary judgment, wasn't it?

MR. GUITTAR: Yes, it was, Mr. Justice Rehnquist.

I think that -- I do not recall whether any harm is alleged in the prayer subsequent to the pleading of the third cause of action.

However, I believe you're correct, Mr. Justice Stewart.

I believe that the standard of substantial evidence, which the Ohio Supreme Court, in the Beck case, placed upon the secretary of state of Ohio, is sufficient to meet the procedural defective allegations which the plaintiffs have raised here.

I would like to pass on next to the question of the statute itself. I believe it's fair to say that if this Court has spoken out against any words, any particular words and condemned them for vagueness, the words are the word "advocacy" and its use in loyalty oaths. The Court has repeatedly condemned the use of that language.

If the Court wishes to apply that to a political party statute, a political party oath, then certainly this statute of the State of Ohio is unconstitutionally vague, and the ordinary person could not tell from the use of the word "advocacy" and so on whether he was in fact violating that statute.

With the reservation that we deal here with a political party, and the practicality of the matter is not that any individual is punished, but that, it is solely that, a political party label or name does not go on the ballot.

I think in examining the cases which the Court has decided in the area of loyalty oaths, I think it would be well to take in mind that there is no discharge and no dismissal problem here as the Court has had before it so many times,

particularly in the academic freedom cases.

I would like to point out to the Court that we also are dealing here with a matter of what the State Legislature has deemed the self preservation and the self-defense of the State through requiring the oath as restricted by the district court.

Q What is the interest of the State?

MR. GUITTAR: The interest is --

Q It's not -- if I understand you correctly, it's not that this man will hold office. Right?

MR. GUITTAR: That's correct, Mr. Justice Marshall, and the statute really does not operate against a man. A man can go on the ballot, but he can't have a party label on it, if the affidavit has not been executed.

Q Even if the man is the most loyal citizen in the world, and he wants to run under that label, he can't?

MR. GUITTAR: Well, I believe, Mr. Justice Marshall, that an examination of the Beck decision by the Ohio Supreme Court shows that if the Communist Party itself were to tender this oath, that the Oahio Supreme Court has recognized the fact that someone is a Communist does not necessarily mean that they believe in force or violence.

Q But my point is that a man who is not a member of this party and who doesn't advocate anything but good, solid Americanism, plus motherhood, wants to run on that label,

he can't?

MR. GUITTAR: I believe he can.

Q Well, how could he? If they don't file an affidavit?

MR. GUITTAR: Well, yes, he would have to file the affidavit; they would have to file the affidavit.

Q But he couldn't -- there's no way for him to run unless they file the affidavit?

MR. GUITTAR: Under the party label, that's right. That's right.

In other words, that loyal individual --

Q Well, what is the interest that Ohio has in that?

MR. GUITTAR: Well, Ohio, I think it's fair to say, cannot have any interest in keeping loyal American citizens off, and citizens of Ohio, off the ballot; and I don't believe that this --

Q Well, is it to keep disloyal parties off the ballot?

MR. GUITTAR: Well, my use of the word "disloyal" was unfortunate. That is not part of the district court's reading.

Q Well, I'm still trying to find out what is the interest of the State in not letting a party use its name on a ballot?

MR. GUITTAR: If a party is committed to the overthrow, to attempting to overthrow the government by force and --

Q What interest is not letting them have their name on the ballot?

MR. GUITTAR: Well, if they become elected, through the use of the name, --

Q Then you can keep them out by the oath. Right?

MR. GUITTAR: That's right. But if the oath were not there --

Q Well, what is the interest in not letting them run?

MR. GUITTAR: It's -- my understanding is it is not an interest in not letting them run, it is an interest in not letting them run without the party label. If I understand you --

Q Well, what is the interest in not having the party label on the ballot? Does it contaminate the ballot or something?

MR. GUITTAR: No, it does not.

Q Well, then, what's the reason for it?

MR. GUITTAR: Well, unfortunately, Mr. Justice Marshall, I cannot refer you to legislative history. This is a statute which was passed in 1941. There are no debates, there's no legislative intent to refer to that I can give further explanation, other than that the --

Q But do you feel that's the responsibility of the assistant Attorney General of Ohio to give to this Court the reason that the State has for this statute? You feel a responsibility for it?

MR. GUITTAR: Yes, I do.

Q That's all I'm asking.

MR. GUITTAR: I know, Mr. Chief Justice Marshall. I'm endeavoring as best I can to answer you.

I believe what you're asking me is what difference, so long as someone can be on the ballot.

Q My question is: what is the State's interest in enforcing this statute? That's my question.

MR. GUITTAR: Well, it's in keeping off the ballot individuals who are members of a party who could be elected through the use of a party name, which party attempts to overthrow the government by force and violence, to thereby become elected and to use the offices of the State in an attempt to overthrow the government by force or violence.

Q I don't see anything in the oath that says that, I mean in this thing that says that. But I guess that's the best you can do.

MR. GUITTAR: With respect to the State's interest in avoiding that to which I just referred, I believe this Court has implicitly recognized or explicitly recognized this interest in the Garner case, in the Doud case, and implicitly

in the Gerende case.

Moving along to the Court's opinion below, and the restricted reading which the court gave this statute below, with respect to Item No. 1 of this Constitution, I believe is fully constitutional. There are no cases cited, nor can there be any, which do anything other than sustain the constitutionality of the language required, namely, that one should not be attempting -- that the party should not be attempting or engage in an attempt to overthrow the government by force and violence.

MR. CHIEF JUSTICE BURGER: I think we'll resume right after lunch on that point.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: You may proceed, Mr. Guittar.

MR. GUITTAR: Thank you, Mr. Chief Justice, and may it please the Court:

With respect to going to the second limitation, which the district court below placed upon the Ohio statute 3517.07, the second limitation -- the first being that the party is not engaged in an attempt to overthrow the government by force or violence. The second one, the party does not carry on a program of sedition or treason, as defined by the criminal law.

As my brother points out in his brief, there is no Ohio criminal law defining sedition. But there is for treason. And that is substantially the same as the treason which is provided by the federal law.

And the treason citation is 2921.01 of the Ohio Revised Code, and has to do with the levying award.

With respect to -- I would like to point out to the Court that in the Keyishian case, this Court has specifically validated from vagueness the use of the word "treason" with respect to oaths.

With respect to the third provision, it is that the party is not knowingly associated with a group attempting to overthrow the government, I believe that there is sufficient

scienter in there both from the decision of the Ohio Supreme Court and the scienter which can be implied from this Court's case in Gerende, which was approved in Baggett and also Whitehall.

At page 137 of the Beck case, the Ohio Supreme Court, with respect to this question, stated that the individuals involved must be personally, personally engaged in these activities.

But, further, if the Court should find that there's no sufficient scienter in the third limitation placed on the oath, we suggest that the Keyishian case, which requires you must have a specific intent to further the illegal aims of the organization, would be a proper further limitation.

We believe, for all the reasons,that the oath as limited is not unduly vague, and can be understood by those who are required to sign it on behalf of a party.

With respect to the equal protection claim, violations thereof, I believe it's a legitimate State interest and can reasonably be legislated by the State Legislature that parties who have perpetually participated in the election process over the years, and parties who have not had anyone utilize the State in attempting to overthrow the State by force or violence, that is a perfectly proper and natural use of the power and does not violate equal protection.

I would like to point out one citation which is not

in our brief, which the Court may wish to take into consideration in its deliberations and decision on this case, and that is Lisker vs. Kelly, which was affirmed just last year, 401 U.S. 928. That case involved candidates and the use of a candidate's oath. The oath was found proper in that case.

In summation, I urge that the Court approve the finding and decision of the district court; I believe that the interests of the State in self-preservation are sufficient to require this party oath. We believe that the Gerende decision is still the law of the land, and is controlling in this case.

I thank the Court very much, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Rosen, do you have anything further?

REBUTTAL ARGUMENT OF SANFORD JAY ROSEN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. ROSEN: If I may, Mr. Chief Justice.

Q Mr. Rosen, may I ask you a question? Justice Stewart asked Mr. Guittar as to the steps that the party has actually taken to get on the ballot in Ohio. And I notice that there were apparently affidavits filed in connection with the motion for summary judgment that I don't find in the Appendix.

Did those affidavits offer any additional information, other than the pleadings, as to what had been done by the

party towards getting on the ballot?

MR. ROSEN: Your Honor, I can't honestly say. I haven't seen those affidavits in a while, myself. And I don't recall where they are in the file. But your question, it seems to me, is a broader question addressed to precisely the considerations that Mr. Justice Stewart was raising, and that was the first point that I did wish to make on rebuttal.

That is, how was the issue raised and why is it in such a rather thin status? It may well be that the affidavits do allege additional harm.

The issue was raised in the following form, Your Honors:

Complaint was filed on January 28, 1970. Now, for a complaint to be filed on that day, it was impossible, under the statute, for my clients to execute the affidavit. The statute provides that the affidavit must be filed with the secretary of state between nine months prior to the next election and six months prior to the next election. Conceivably, they might have waited a few more weeks, to actually submit the affidavit, or to make a request for consideration on the ballot, for placement on the ballot without an affidavit. Or they might have tried to fulfill all other requirements for inclusion on the ballot, without an affidavit.

But you have to recall this case has a history.

This case has been before this Court once, twice; the Ohio election laws have been before this Court -- this is the third time. There was a small portion of the Ohio election laws dealt with in the Siboletti? case, I believe, which this Court resolved in summary fashion earlier this term, and of course Williams vs. Rhodes.

And my clients reading Williams vs. Rhodes, and being cognizant of the fact that they were denied injunctive relief by you, Mr. Justice Stewart, and then confirmed by the Court in Williams vs. Rhodes, for failure to prosecute their cause of action quickly can hardly be faulted for moving at the earliest possible opportunity to challenge as many of the provisions of the interconnected, intertangled web of Ohio election laws, which they believed were inhibiting their ability to get ballot position.

Q Well, they can't certainly -- excuse me.

Q Are they in position to challenge the ones they contest until they've complied with the ones that they can't argue?

MR. ROSEN: Now, on an oath type provision, it hasn't been the understanding of this Court that there is a requirement of attempt -- that there's any requirement that efforts be made to comply with the oath requirement first.

Q I don't mean to comply with the oath, but I mean to comply with presumably a ministerial type of filing regula-

tions that may exist that you don't quarrel with.

MR. ROSEN: Well, but, you see, as the case was formulated, this was one of ten provisions engaged in two separate lawsuits that were consolidated in order to try to bring to an end the questions over the Ohio election laws. Our clients decided to go in one lawsuit, and to bring all of their challenges at once.

It doesn't seem to me possible that they could have attempted to comply by registration requirements; they couldn't register because they didn't have the requisite number of signatures at that point.

They weren't in a position yet to attempt to certify that they wanted to have a primary yet. They were challening the primary provisions. They were challenging an entire range of provisions, some of which had some bearing on the ripeness or the pure ripeness of the way in which the affidavit provision might be dealt with.

Now, in order to bring that challenge to the affidavit provision early enough to get complete relief before the 1970 election, they had to bring it all in one lawsuit. And it seems to me that's the reason why there wasn't the kind of pleading that Justice Stewart was alluding to, which would focus on the specific harm of this kind of an affidavit.

It's my understanding, further, that the appellees intend to enforce the statute as construed in the future.

It's my understanding that my clients intend to occupy a ballot position in the 1972 election, and presumably will attempt to have a ballot position in subsequent elections as well.

So they are still operating under the gun of this affidavit requirement, and the statute itself. For this election, the appellee or his -- well, I guess it's not his successor at this point, presumably could refuse them a position on the ballot, for failure to file the affidavit. I don't know that he is, in fact, precluding them at this election, but he could certainly do it in a subsequent election.

So for those various reasons we do believe that the pleadings, although a bit skimpy, do assert or allege irreparable harm and do meet the tests of pleading and state before this Court an adequately ripe controversy for disposition by the Court.

I just wanted to address two other points that came up in argument on the part of the appellee.

The first, perhaps the more minor point, is: appellee represents to this Court that the Supreme Court of Ohio, in Ex parte Beck vs. Hummel, adopted a rule that the affidavits when filed are presumed to be true and made in good faith.

Now, I've been rereading the language of the Supreme

Court of Ohio on that particular point, and perhaps I've missed something, but I find that the Supreme Court of Ohio says there is no showing in the record before the secretary that anyone connected with the Ohio Wallace for President committee advocates the overthrow of government by force.

And the fact that some members among the many thousands may belong to the Communist Party, or the Communists may advocate the election of Wallace, is no proof that the affidavits in accordance with the statute were not filed in good faith, or that it is not efficacious for the purpose for which it was filed.

All the Supreme Court of Ohio presumably is saying is once the affidavit is filed, the burden of going forward shifts to the secretary, and he must take some steps to investigate; but says nothing about the ultimate burden of proof.

Q Well, isn't an affidavit presumed to be true? If not, why do you have to have an affidavit?

I don't see how this is material in this case at all.

MR. ROSEN: Well, perhaps initially it's presumed to be true, but the next point is, Mr. Justice Marshall, once the secretary conducts his investigation, his findings are sustained unless they are not supported by substantial evidence, or are against the weight of the evidence; which is hardly the kind of test this Court has applied in cases like Speiser and

other cases involving a scrutiny of administrative determinations bearing upon First Amendment rights.

Q Well, is there any allegation in the complaint or in the affidavits that the party, that your clients would refuse to execute the offer of affidavit?

MR. ROSEN: The complaint certainly doesn't specifically allege that they would refuse to do so. But even -- I don't think that's a fatal flaw in pleading, because, presumably, even if they executed the affidavit, they still are subject to the burden of the statute, and that doesn't get them on the ballot automatically.

The other flaws in the Ohio provision and procedure are still clearly before the Court.

I'm sorry that I'm not cognizant with the affidavits that supported the motion for summary judgment.

Q When you speak of the other requirements, are you referring to the 7 percent?

MR. ROSEN: No, I'm sorry, Mr. Chief Justice, I am referring to the investigation that is to be conducted by the secretary of state, for him to make a determination of whether the party should have a ballot position. The statute doesn't just let it rest on affidavits. It charges the secretary of state to go forward and conduct an investigation; quite explicitly charges him to conduct an investigation.

And there's nothing in the opinions of any of the

courts to deal with this statute, to indicate that.

Q Well, at this stage, how do you come to the conclusion that the secretary of state did not find you eligible to get on the ballot, provided you signed the affidavit?

MR. ROSEN: Well, in the context of the First Amendment, of course, and the vagueness and overbreadth doctrine, according to the decisions of this Court, it's not necessary for us to put ourselves precisely in the position of being denied ballot position.

If, as in Speiser vs. Randall, the procedure is infirm from beginning to end, we don't have to take the first step to conform to that procedure. We can stop at the door and say, this is bad; we go no further.

And we have adequate standing and a ripe enough controversy to raise all of those issues.

Q At this stage and on this record we have no way of knowing that your clients declined to sign the affidavit, do we?

MR. ROSEN: Unless there is something in the affidavits in support of the motion for summary judgment, we don't. And I'm sorry, I'm just not --

Q Well, we really --

MR. ROSEN: -- cognizant of that. That may be in the record.

Q But the record of the case as you bring it here

doesn't.

MR. ROSEN: Yes, but the record, of course, the case includes the record, and the record includes the affidavits in support of the motion for summary judgment. I'm just not familiar with that portion of the record.

Q Mr. Rosen, except for what the affidavits may contain, all we have, as I understand it, is paragraphs 18, 19, 20, and 21, appearings on pages 12, 13, and 14 of the Appendix. Is that correct?

MR. ROSEN: That is correct. We also have, of course, page 18 of the Appendix, the answers of the defendant.

Q Yes, in which 19 is admitted and 20 and 21 are denied.

MR. ROSEN: Yes, 20 and 21 are denied. That is all that we have. That and the determination of the district court, that it felt it had a live controversy before it at the time. And certainly in view of the decision of the Supreme Court of Ohio in the Beck case, it certainly feels like a live controversy. The highest court of Ohio said this is a viable operational statute.

The only other decision on point of that particular statute also sustained it as a live viable statute, and that case is State ex rel. Berry vs. Hummel, 59 N.E.2d 238, a Court of Appeals decision in Ohio.

But, so far as the record is concerned, you're quite

right, Mr. Justice Stewart; as I suggested, I do think that this does still present the Court with adequate --

Q But I gather you prefer not to sign a loyalty oath or to subject yourself to investigation; is that just because you don't like it, or do you allege it's going to chill you in some way?

MR. ROSEN: Yes. The allegation is that there will be irreparable harm, that it will --

Q Of what?

MR. ROSEN: -- it will subject the plaintiffs in this case to an investigation of whether they are engaged --

Q How about the affidavit?

MR. ROSEN: The affidavit itself puts them on record in terms of their political views, and their political position.

None of the other loyalty oath cases required the actual presentation of the affidavit.

Q Well, they all don't --

MR. ROSEN: The request for the affidavit itself is adequately chilling.

I beg your pardon?

Q If I'm not mistaken, the loyalty oath cases involved people who refused to sign a loyalty oath, didn't they?

MR. ROSEN: Yes, sir.

Q And there's no such allegation here.

MR. ROSEN: Right.

I think, I hope, since the affidavits in support of the motion for summary judgment will bear that out.

Secondly, even if not, the statute is still before the Court. Even assuming my clients were to execute such an affidavit.

Well, the statutory machinery becomes engaged, and that machinery does itself have the kind of chilling effect which they could complain about, even after they filed the affidavit. It still puts upon them the burden of going forward, the burden of ultimate proof, and provides them with no procedural safeguards in terms of the investigation and fact-finding determination.

Q But, surely, a person can't just sit down in his law office and thumb through the code of laws of a State and find one that he thinks is unconstitutional and bring a lawsuit attacking it, can he?

He has to show, some way or another, that he's hurt by it.

MR. ROSEN: But I've just suggested one way in which he has been hurt, and I don't think that this is a case in which somebody has been trying to go through a code and find the law and hunt and peck, sort of like sorting strawberries. This case has to be evaluated in context. The Ohio election law has been in litigation for five years now. This is running

into the fifth year. And this is the third case to come before the Supreme Court on its merits.

Q But I don't see what that has to do with this.

MR. ROSEN: This particular pleading, for instance, I'm trying to, in effect, formulate the context in which this suit would be actually mounted.

Q Well, I didn't ask you about the context; I mean, it's just these three paragraphs, isn't it?

MR. ROSEN: That's right.

Q The context of this claim.

MR. ROSEN: Yes, in that fashion.

Q Plus whatever the affidavits might show?

MR. ROSEN: Right. But I'm trying to suggest tht it was a complicated lawsuit that was being mounted, and that a lot of the energy in terms of the pleadings may have been focused on some of the other provisions as well as upon this provision, just as when we formulated our brief for this Court, by some fortune we spent some 15 or 16 pages dealing with the issues involved in this particular provision; but we focused more on the other provisions that we were attacking as well as this provision, and indeed the appellees found themselves in precisely the same setting, in an effort to keep the suit within manageable paper range.

Q So you file a piece of paper in the district court, and the brief here, and then we go and look at the record and

find out what the case is all about.

MR. ROSEN: Well --

Q Well, we will have to go find the affidavit, don't we?

MR. ROSEN: The affidavits in support of the motion for summary judgment.

Q Well, don't we have to go look for that?

MR. ROSEN: I would assume that, yes.

Q Well, I'll do it for you.

[Laughter.]

MR. ROSEN: Thank you, Your Honor.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rosen.

Thank you, Mr. Guittar.

The case is submitted.

[Whereupon, at 1:21 o'clock, p.m., the case was submitted.)

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