Supreme Court of the United States

OCTOBER TERM, 1965

No. 656

BARBARA ELFBRANDT, PETITIONER

vs.

IMOGENE R. RUSSELL, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

INDEX

[fol. A]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 7406

BARBARA ELFBRANDT, for herself and others similarly situate, APPELLANTS

vs.

IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, ET AL., APPELLEES

ABSTRACT OF RECORD

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Attorneys for Appellants

[fol. 1]

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

No. 68,451

BARBARA ELFBRANDT, for herself and others similarly situate, PLAINTIFFS

vs.

IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona;

PAUL J. FANNIN, Governor of the State of Arizona;

ROBERT W. PICKRELL, Attorney General of the State of Arizona;

JEWEL W. JORDAN, State Auditor;

LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELWOOD W. BRADFORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS, and LEON LEVY, members of the Board of Regents;

and

W. W. DICK, State Superintendent of Public Instruction, and PAUL J. FANNIN, Governor, ex-officio members of the Board of Regents;

FLORENCE REECE, Pima County Superintendent of Schools;

ROBERT D. MORROW, Superintendent of Tucson School District #1;

[fol. 2]

JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WILLIAM J. PISTOR, School Board, Tucson District #1;

and

RICHARD A. HARVILL, President of the University of Arizona, DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT
and
PETITION FOR TEMPORARY RESTRAINING ORDERS, ORDERS TO SHOW CAUSE, AND INJUNCTION—filed June 1, 1961

Comes now BARBARA ELFBRANDT, the plaintiff in the above-entitled action, for herself and for all others similarly situated as herself, and alleges as follows:

I

The plaintiff, BARBARA ELFBRANDT, is a resident of Pima County, Arizona; she was employed by the defendant Amphitheater School District No. 10, Pima County, Arizona, under a teaching contract dated June 1, 1960, covering the academic period September 1, 1960, through June 8, 1961, in the capacity of Eighth Grade teacher of Language and Social Studies. She is presently [fol. 3] an employee of the State of Arizona, within the meaning of Subsection B, S 38-231, Chapter 2: QUALIFICATION AND TENURE, Title 38, PUBLIC OFFICERS AND EMPLOYEES, Arizona Revised Statutes 1956. She is presently employed by the Board of Trustees of Amphitheater School District No. 10, Pima County, Arizona, under Teacher's Contract dated April 24, 1961, for the period of August 31, 1961, through June 7, 1962, a copy of which contract is attached hereto as Exhibit "A" and made a part hereof for all purposes.

By reason of her being a State employee within the meaning of the aforesaid law of the State of Arizona, she is similarly situated as to all other employees of the State and therefore a suitable party to bring this action on behalf of all persons denoted within subsection B of Sec. 38-231, Chapter 2, Title 38, ARS 1956:

> "For the purposes of this section, the term officer or employee means any person elected, appointed, or employed, either on a part-time, or full-time basis, by the state, or any of its political subdivisions or

[fol. 4] any county, city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing."

II

The defendants are as follows:

IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT are duly elected and qualified members of the Board of Trustees of Amphitheater Elementary School District No. 10, and Amphitheater School is a duly qualified school under the laws of the State of Arizona.

PAUL J. FANNIN is the duly elected, qualified and acting Governor of the State of Arizona.

ROBERT W. PICKRELL is the duly elected, qualified and acting Attorney General of the State of Arizona, charged by law with the duty of enforcing and interpreting on behalf of the State officials, the Constitution, Statutes and Laws of the State of Arizona, and with serving as legal advisor to the Board of Regents.

JEWEL W. JORDAN is the duly elected, qualified and acting Auditor of the State of Arizona.

[fol. 5] LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELWOOD W. BRADFORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS and LEON LEVY are the duly qualified and acting members of the Board of Regents, and W. W. DICK, State Superintendent of Public Instruction and PAUL J. FANNIN, Governor of the State of Arizona, are ex-officio members of the Board of Regents.

FLORENCE REECE is the duly elected, qualified and acting Superintendent of Schools of Pima County, Arizona;

ROBERT D. MORROW is the duly elected, qualified and acting Superintendent of Tucson School District #1, Pima County, Arizona.

JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WIL-

LIAM J. PISTOR, are the duly elected, qualified and acting members of the School Board of Tucson School District #1, Pima County, Arizona.

RICHARD A. HARVILL is the duly acting and qualified President of the University of Arizona.

The named defendants are sufficiently representative of the class of officials of the State of Arizona who may in part by, or are, authorized, or who may be interpreted [fol. 6] to be authorized, in whole or in part, to undertake a duty or act in connection with the aforesaid statute (Title 38, Public Officers and Employees, Chapter 2, Sec. 38-231, A.R.S. 1956) as set forth in Subsection A thereof:

> "In order to insure the statewide application of this section on a uniform basis, each board, commission, agency, and independent office of the state, and of any of its political subdivisions, and of any county, city, town, municipal corporation, school district, and public educational institution shall immediately upon the effective date of this act completely reproduce Sec. 38-231 as set forth herein, to the end that the form of written oath or affirmation required herein shall contain all of the provisions of said section for use by all officers and employees of all boards, commissions, agencies and independent officers."

The named defendants are sufficiently representative to be of a class in connection with the questions involved [fol. 7] in this litigation, being so representative of the interests of all such persons similarly situated as to afford this litigation the legal characteristics of an action against a class of defendants, to-wit, all the aforesaid boards, commissions, agencies and independent offices of the State.

III

The plaintiff Barbara Elfbrandt is informed and therefore believes that pursuant to the aforementioned Act, the defendants have made or are making demand upon all of their subordinate employees or associates as named with-

in the foregoing Act, that they sign or affirm a document containing a form of Statement substantially copied after the words of Sec. 38-231, Chapter 2, Title 38, A.R.S. 1956.

The plaintiff is also informed and therefore believes that each such document contains substantially the wording of the Oath as contained in subsection G and subsection E of Sec. 38-231, Chapter 2, Title 38, A.R.S. 1956.

Pursuant to the Act, the defendant Board of Trustees [fol. 8] of Amphitheater Elementary School District No. 10: IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, have, through their duly authorized agents, demanded that the plaintiff BARBARA ELFBRANDT sign, swear to or affirm an Oath, a copy of which document is attached hereto and marked "Exhibit B." The plaintiff has been informed by the defendant Trustees that unless she complies with such demand her employment will be terminated by the defendants.

IV

The word "oath" and the word "affirmation" are used interchangeably herein, and wherever either appears, it is meant to indicate both oath and affirmation.

V

The plaintiff is informed and therefore believes that other defendants are demanding of their employees or subordinates immediate compliance with Sec. 38-231, Chapter 2, Title 38, A.R.S. 1956, as has been demanded of her, although the effective date of the Act was March 30, 1961, and subsection C thereof allows the empoyee elected, appointed or employed prior to the effective date [fol. 9] of the Act, ninety (90) days after said effective date—to-wit: till June 28, 1961, within which to take and subscribe to the form of oath or affirmation.

The plaintiff alleges that by this demand for her immediate compliance, (see Exhibit "C" attached hereto and made a part hereof), her rights under subsection C of said Act are being now violated; and, upon her in-

formation and belief that such demand for immediate compliance is being made upon other plaintiffs, alleges that their rights are also now being violated.

VI

The terms, provisions and requirements of the Act and the oath are in violation of the rights, privileges and immunities of both the plaintiff and all other employees, officers of the State of Arizona as defined in the Act, under the Constitution of the United States in the following particulars:

1. They violate the rights guaranteed under the First Amendment as made applicable to the States by the Fourteenth Amendment;
2. They violate the rights guaranteed under the Fifth [fol. 10] Amendment as made applicable to the States by the Fourteenth Amendment;
3. They deprive the plaintiffs of their rights without due process of law and deny them the equal protection of the laws as guaranteed by the Fourteenth Amendment;
4. They constitute a Bill of Attainder contrary of Article 1, Section 10; and
5. They violate the rights guaranteed under the Sixth Amendment as made applicable to the States by the Fourteenth Amendment.

VII

The terms and provisions of the Act and the oath are in violation of the rights, privileges and immunities of the plaintiffs and all other employees—officers of the State of Arizona as defined in the Act, in the following particulars:

1. They are a denial of the fundamental principals essential to the security of individual rights and the perpetuity of free government, guaranteed by Article 2, Section 1 of the Arizona Constitution.
2. They are a denial of the right of due process of [fol. 11] law: that no person shall be deprived life, liberty, or property without due process of law, guaranteed by Article 2, Section 4.

3. They are a denial of the right of petition and of the people peaceably to assemble for the common good, which shall never be abridged, as guaranteed by Article 2, Section 5.

4. They violate the right of every person to freely speak, write and publish on all subjects, as guaranteed by Article 2, Section 6.

5. They violate the right to the method of administering an oath or affirmation so as to be consistent with and binding upon the conscience of the person to whom such oath or affirmation may be administered, as guaranteed by Article 2, Section 7.

6. They violate the right of a person not to be disturbed in his private affairs, as guaranteed by Article 2, Section 8.

7. They violate Article 2, Section 10.

8. They are violative of Article 2, Section 12.

[fol. 12] 9. They violate Article 2, Section 13, guaranteeing equal privileges and immunity of the laws.

10. They violate Article 2, Section 15.

11. They violate Article 2, Section 23, guaranteeing the right of jury.

12. They are violative of the guarantees contained in Article 2, Section 24.

13. They constitute a Bill of Attainder, contrary to Article 2, Section 25. They further violate Article 2, Section 25, in being "ex-post-facto" in their operation.

14. They are violative of Article 2, Section 28.

15. They are violative of Article 2, Section 33, in that they attempt to take away rights retained by the people.

VIII

This action is brought by the plaintiff for and on behalf of herself and all others similarly situated, in accordance with the Declaratory Judgment Act of this State, for the purpose of testing and determining the Constitutionality [fol. 13] of the Act and the rights of the defendants to establish, enforce, carry out and administer the provisions thereof through the insistence that the plaintiffs and other State Employees, officers, as defined, execute the oath or affirmation.

Unless the defendants be restrained from enforcing, carrying out and administering the provisions of the Act and from insisting upon the execution of the oath, or, upon their failure to execute the oath, refusing to continue to employ or to continue to make payments of otherwise due and obligatory salaries and emoluments, the plaintiff and others so situate will suffer great and irreparable injury not compensable in monetary damages.

IX

Plaintiffs have no speedy and adequate remedy at law. In the event the plaintiffs insist on maintaining their aforedescribed Constitutional rights, and the rights retained by the people and guaranteed retained by the Constitution of Arizona, and refuse to execute the oath demanded from them, they will be subject to immediate discharge from their empoyment and/or immediate loss [fol. 14] of their otherwise earned and entitled salaries and emoluments.

WHEREFORE, plaintiff demands relief as follows:

1. That the Court issue its Temporary Restraining Order:

Restraining each of the named defendants and all other defendants within the class of the defendants named herein, either upon service of a copy of this Complaint and the Order of the Court, or upon their being informed of this Complaint and its contents and the requested Temporary Restraining Order of the Court, until further order of the Court, to be made at the time of the hearing on the Order to Show Cause hereinafter prayed for,

From establishing, enforcing, carrying out, or administering the provisions of Chapter 2, Title 38, Sec. 38-231, A.R.S. 1956; or from withholding or denying, through the use of the oath or otherwise, the payments of salaries and/or emoluments to employees.

2. That the Court issue its Order to Show Cause, ordering the named defendants to appear for and on behalf [fol. 15] of themselves and all other defendants situated in the same condition, as set forth in the Complaint here-

in, at a time and place to be set by the Court, then and there to show cause why the aforesaid Restraining Order should not be made permanent pendente lite.

3. That the defendants named and other defendants within the class as defined in subsection A, Title 38, Chapter 2, Sec. 38-231, A.R.S. 1956 and indicated as officers or employees to enforce the provisions thereof, be permanently enjoined from enforcing the provisions of Sec. 38-231, A.R.S. 1956, Title 38, Chapter 2, and from requiring any oath or affirmation pursuant to said Act.

4. Plaintiff further demands an adjudication by this Court that Sec. 38-231, Chapter 2, Title 38, A.R.S. 1956 violates the Constitution of the United States and the Constitution of the State of Arizona and is therefore void and of no effect.

5. Plaintiff further demands that the Court issue its Temporary Restraining Order, restraining the defend-
[fol. 16] ants from attempting to enforce the giving of any oath or the denial of any salary pending the giving of the oath prior to June 28, 1961, as being in violation of the terms of the Statute.

6. That the Court issue its Order to Show Cause, ordering the named defendants to appear for and on behalf of themselves and all other defendants similarly situate as set forth herein, at a time and place to be set by the Court, to show cause why the Temporary Restraining Order demanded in Paragraph 5 herein, should not be made permanent pendente lite.

And such other and further relief as the Court may deem just and equitable in the premises.

/s/ Barbara Elfbrandt
BARBARA ELFBRANDT,
Plaintiff

[*Duly sworn to by W. Edward Morgan jurat omitted in printing*]

[fol. 17] (Attached to the Complaint as "Exhibit A" is a Teacher's Contract dated April 24, 1961, between Barbara Elfbrandt and the Board of Trustees of Amphitheater School District No. 10.)

(Attached to the Complaint as "Exhibit B" is a copy of Loyalty Oath made out in the name of Barbara Elfbrandt but not bearing her signature.)

[fol. 18] (Attached to the Complaint as "Exhibit C" is a copy of Amphitheater Schooletter dated May 1, 1961.)

* * * *

ORDER TO SHOW CAUSE—June 6, 1961

A verified Complaint having been filed in the above entitled matter, and good cause therefor appearing,

IT IS THE ORDER OF THIS COURT that you, the following defendants:

IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona;

PAUL J. FANNIN, Governor of the State of Arizona;

ROBERT W. PICKRELL, Attorney General of the State of Arizona;

JEWEL W. JORDAN, State Auditor;

LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELMWOOD W. BRAD-[fol. 19] FORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS and LEON LEVY, members of the Board of Regents; and W. W. DICK, State Superintendent of Public Instruction, and PAUL J. FANNIN, Governor, ex-officio members of the Board of Regents;

FLORENCE REECE, Pima County Superintendent of Schools;

ROBERT D. MORROW, Superintendent of Tucson School District #1;

JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WILLIAM J. PISTOR, School Board, Tucson District #1; and

RICHARD A. HARVILL, President of the University of Arizona,

appear before the Court, in Court Room No. —— Pima County Superior Court in the Court House at Tucson, Pima County, Arizona, on Thursday, the 15th day of June, 1961, at 8:30 a.m. of that day, then and there to show cause, if any you have, why each of you and all other defendants within the class of defendants indicated in the Complaint, should not be restrained and enjoined from establishing, enforcing, carrying out or administering the provisions of Chapter 2, Title 38, Sec. 38-231, [fol. 20] A.R.S. 1956 as amended, and/or from withholding or denying through the demand for the affirmation or oath, the payments of any salaries or emoluments to the named plaintiff, Barbara Elfbrandt, or to the employees and officers and others as defined in said Act, pendente lite.

AND IT IS FURTHER ORDERED that the Clerk of Court issue two true copies of this Order, and a copy of this Order under the Seal of this Court, together with a copy of the verified Complaint filed herein, be served upon you at least five (5) days before the time fixed for the hearing thereof.

DONE IN OPEN COURT at 4:25 p.m., this 6th day of June, 1961.

/s/ Lee Garrett
Judge

* * * *

[fol. 21] (The following is attached to Motion to Dismiss:)

State of Arizona
House of Representatives
Twenty-Fifth Legislature
First Regular Session

CHAPTER 108, HOUSE BILL NO. 115

AN ACT

RELATING TO CRIMES; TO THE PROTECTION OF THE SAFETY OF THE STATE OF ARIZONA AND THE FUNDAMENTAL LIBERTIES OF ITS CITIZENS FROM THE INTERNATIONAL COMMUNIST CONSPIRACY; PROSCRIPTION OF THE COMMUNIST PARTY IN ARIZONA; DEFINING THE CRIME OF SEDITION; REQUIRING LOYALTY OATHS BY PUBLIC OFFICERS AND EMPLOYEES; PRESCRIBING PENALTIES; AMENDING TITLE 16, CHAPTER 2, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTIONS 16-205 AND 16-206; AMENDING TITLE 13, CHAPTER 2, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 40.1, SECTIONS 13-707 and 13-707.01, AND AMENDING SECTIONS 38-231 and 38-233, ARIZONA REVISED STATUTES.

Be it enacted by the Legislature of the State of Arizona:

Section 1. This act may be cited as the Arizona Communist Control Act of 1961.

[fol. 22] Sec. 2. Title 16, Chapter 2, Article 1, Arizona Revised Statutes, is amended by adding Section 16-205, to read:

16-205. *Findings of fact and statement of public policy by the legislature of the State of Arizona concerning steps which must be taken to protect the fundamental rights of the citizens of this state and the safety of this state from international Communistic conspiracy.*

A. Upon evidence and proof which has been presented before this Legislature, other State Legislatures, the Congress of the United States and in the courts of the United States, and in the courts of the several states; and although recognizing that the federal Constitution vests the conduct of foreign relations in the federal government and the federal Constitution guarantees to the several states a republican form of government and protection against foreign invasion and domestic violence, this state has the duty of self-preservation and the taking [fol. 23] of necessary measures to cooperate with the federal government in the preservation of the Peace and safety of the State of Arizona and in order to carry out Article 2, Section 21 of the Arizona Constitution relating to free and equal elections and Article 7, Section 12 of the Arizona Constitution relating to the enactment of laws to secure the purity of elections; and in order to guard against the abuse of the elective franchise by the Communist Party of the United States which from time to time has qualified as a purported legitimate political party in the State of Arizona; and in order to secure to the citizens of this State their unalienable personal rights and liberty of conscience secured by the provisions of the Constitution of Arizona and in order to protect the peace and safety of the State of Arizona from the overthrow of its constitutional government by force or violence, and of its political subdivisions, the Legislature of the State of Arizona finds and declares that, unlike other political parties which have evolved their policy and programs through public means, by the reconciliation of a wife [fol. 24] variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are prescribed for it by the foreign leaders of the world Communist movement.

B. The Communist Party members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined

to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike legitimate political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful policical means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limi-
[fol. 25] tation as to the nature of its activities, and its dedication to the proposition that the present constitutional government of the United States, the governments of the several states, and the government of the State of Arizona and its political subdivisions ultimately must be brought to ruin by any available means, including resort to force and violence.

C. The establishment of a totalitarian dictatorship in any country results in the supression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government such as freedom of speech, of the press, of assembly, and of religious worship, and said totalitarian dictatorship ruthlessly supresses academic freedom and inquiry into any human knowledge except the official doctrine of the dictatorship. This results in the maintenance of control over the people through fear, terrorism, and brutality.

[fol. 26] D. It is the public policy of this state to protect the safety of the constitutional government of the State of Arizona by constitutional means and at the same time protect the rights of the members of our free society to speak, to assemble and to inquire, including the principle of academic freedom which by fostering healthy self-criticism is especially vital in the progress of man's moral values and in man's exploration of the secrets of the atom on this planet and in outer space. To protect the safety of this state and the right of free citizens in a free society to inquire and to understand totalitarianism, it is essential that the schools, colleges and universities teach objectively and critically the governmental and

social forms of past and present totalitarian slave states, including the foreign languages spoken therein.

The rights set forth in this subsection do not include the right to embrace Communism or to attempt to persuade others to embrace Communism.

E. The direction and control of the world Communist movement is vested in and exercised by the Communist [fol. 27] dictatorship of a foreign country.

F. The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

G. The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force or violence if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political par- [fol. 28] ties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a legitimate political party which operates as an agency by which people govern themselves.

H. In the United States and in this state those individuals who knowingly and wilfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States and this state, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

I. The Communist movement in the several states is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance at a moment when the several states may be so far extended by foreign engagements, so far divided in [fol. 29] counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States and of the several states by force or violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries, including the recent events in the neighboring country of Cuba, have aided in supplanting existing governments. The Communist organization in the United States and in the several states, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the government of the United States, the governments of the several states, and the government of the State of Arizona, including its political subdivisions, that make it necessary that the State of Arizona enact appropriate legislation, recognizing the existence of such world-wide Communist conspiracy, and designed to prevent it from accomplishing its purposes in this state and its political subdivisions. There- [fol. 30] fore, the Communist Party should not be permitted to avail itself to the privileges, rights and immunities conferred by law upon legitimate political parties.

Sec. 3. Title 16, Chapter 2, Article 1, Arizona Revised Statutes, is amended by adding Section 16-206, to read:

16-206. *Proscription of Communist Party of United States, its successors, and subsidiary organizations*

The Communist Party of the United States, or any successors of such party regardless of the assumed name, the object of which is to overthrow by force or violence the Government of the United States, or the Government of the State of Arizona, or its political subdivisions shall not be entitled to be recognized or certified as a political

party under the laws of the State of Arizona and shall not be entitled to any of the privileges, rights or immunities attendant upon legal political bodies recognized under the laws of the State of Arizona, or any political subdivision thereof; whatever rights, privileges or immunities [fol. 31] shall have heretofore been granted to said Communist Party of the United States as defined in this section, or to any of its subsidiary organizations, by reason of the laws of the State of Arizona, or of any political subdivision thereof, are hereby terminated and shall be void.

Sec. 4. Title 13, Chapter 2, Arizona Revised Statutes, is amended by adding Article 40.1, Sections 13-707 and 13-707.01, to read:

ARTICLE 40.1 SEDITION

13-707. *Definition of sedition; parties; punishment*

A. A person who knowingly or wilfully commits, or aids in the commission of any act to overthrow by force or violence the government of this state, or of any of its political subdivisions, is guilty of sedition against the State of Arizona.

B. A person who knowingly or wilfully advocates the overthrow by force or violence the government of this state, or of any of its political subdivisions, is guilty of sedition against the State of Arizona.

C. A person who knowingly or wilfully becames or [fol. 32] remains a member of the Communist Party of the United States, or its successors, or any of its subordinate organizations, or any other organization having for one of its purposes the overthrow by force or violence of the government of the State of Arizona, or any of its political subdivisions, and said person had knowledge of said unlawful purpose of said Communist Party of the United States or of said subordinate or other organization, is guilty of sedition against the state.

D. Any person who violates any provisions of this article is guilty of a felony, and upon conviction thereof shall be punished by a fine of not more than twenty

thousand dollars, or imprisonment in the state prison for not more than twenty years, or both.

13-707.01 *Disqualification to hold office*

Any person who is convicted of violating any provision of this article shall automatically be disqualified and barred from holding any office, elective or appointive, or any position of trust, profit or employment with this state, or any political subdivision of this state, or any county, [fol. 33] city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing.

Sec. 5. Sec. 38-231, Arizona Revised Statutes, is amended to read:

38-231. *Officers and employees required to take loyalty oath; form; Penalty*

A. In order to insure the state-wide application of this section on a uniform basis, each board, commission, agency, and independent office of the state, and of any of its political subdivisions, and of any county, city, town, municipal corporation, school district, and public educational institution, shall immediately upon the effective date of this act completely reproduce Section 38-231 as set forth herein, to the end that the form of written oath or affirmation required herein shall contain all of the provisions of said section for use by all officers and empoyees of all boards, commissions, agencies and independent offices.

B. For the purposes of this section, the term officer [fol. 34] or employees means any person elected, appointed, or employed, either on a part-time or full-time basis, by the state, or any of its political subdivisions or any county, city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing.

C. Any officer or employee elected, appointed, or employed prior to the effective date of this act shall not later than ninety days after the effective date of this act take and subscribe the form of oath or affirmation set forth in this section.

D. Any officer or employee within the meaning of this section who fails to take and subscribe the oath or affirmation provided by this section within the time limits prescribed by this section shall not be entitled to any compensation unless and until such officer or employee does so take and subscribe to the form of oath or affirmation set forth in this section.

E. Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed [fol. 35] by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment, does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly and wilfully becomes or remains a member of the Communist Party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guity of a felony and upon conviction thereof shall be subject to all the penalties for per- [fol. 36] jury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional conpensation or any other emoluments or benefits which may have been incident or appurtenant to said office or employment.

F. Any of the persons referred to in Article XVIII, Section 10 of the Arizona Constitution as amended, related to the employment of aliens, shall be exempted from any compliance with the provisions of this section.

G. In addition to any other form of oath or affirmation specifically provided by law for an officer or em-

ployee, before any officer or employee enters upon the duties of his office or employment, he shall take and subscribe the following oath or affirmation:

State of Arizona, County of ————————.
I, (type or print name) do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to [fol. 37] the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so help me God (or so I do affirm).

————————————
(Signature of officer or employee)

Sec. 6. Sec. 38-233, Arizona Revised Statutes, is amended to read:

38-233. *Filing oaths of record*

A. The official oaths of state elective officers shall be filed of record in the office of the Secretary of State. The official oaths of all other state officers and employees shall be filed of record in the office of the employing state board, commission or agency.

B. The official oaths of notaries public and of elective county and elective precinct officers shall be filed of record in the office of the County Recorder, except the oath of the Recorder, which shall be filed with the Clerk of the Board of Supervisors. The official oaths of all other county and precinct officers and employees shall be filed [fol. 38] of record in the office of the employing county or precinct board, commission or agency.

C. The official oaths of all city, town or municipal corporation officers or employees shall be filed of record in the respective office of the employing board, commission or agency of the cities, towns and municipal corporations.

D. The official oaths of all officers and employees of all school districts shall be filed of record in the office of the Superintendent of Public Instruction.

E. The official oaths of all officers and employees of each public educational institution except school districts shall be filed of record in the respective offices of said public educational institutions.

F. The official oath or affirmation required to be filed of record shall be maintained as a permanent official record.

Sec. 7. *Saving clause*

This act does not apply to any offense committed prior to the effective date of this act, and any such offense [fol. 39] is punishable as provided by the statute in force at the time the offense was committed.

Sec. 8. *Severability*

If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Sec. 9. *Emergency*

To preserve the public peace, health and safety it is necessary that this act become immediately operative. It is therefore declared to be an emergency measure, to take effect as provided by law.

Approved by the Governor—March 30, 1961.

Filed in the Office of the Secretary of State—March 30, 1961.

(FILED: June 15, 1961.)

[fol. 40] ANSWER—filed June 15, 1961

COMES NOW Robert W. Pickrell, Attorney General of the State of Arizona, one of the defendants herein, and for himself and on behalf of the following defendants, Paul J. Fannin, Governor of the State of Arizona, Jewel J. Jordan, State Auditor, Lynn M. Laney, Sr., O. D. Miller, Samuel H. Morris, John G. Babbitt, Elmwood W. Bradford, Vivian Layti Boysen, George W. Chambers and Leon Levy, members of the Board of Regents, W. W. Dick, State Superintendent of Public Instruction, and Paul J. Fannin, as Ex-Officio members of the Board of Regents, and Richard A. Harvill, President of the University of Arizona, answers the Complaint of the plaintiff herein and admits, alleges and denies as follows:

I

The above defendants are without knowledge as to the allegations contained in Paragraph I concerning Barbara Elfbrandt, and therefore deny the same. The defendants further deny that said Barbara Elfbrandt is a suitable party to bring this action on behalf of all persons denoted [fol. 41] within subsection D of Section 38-231, A.R.S., 1956, as amended.

II

The defendants admit the allegations concerning the named persons contained in Paragraph II of the Complaint, but deny all other allegations contained in said paragraph.

III

Defendants deny that they have made any demand on any subordinate employee as alleged in Paragraph III of the Complaint, and specifically deny that any demand was made upon the plaintiff to sign, swear to or affirm any oath, or that upon the failure for her to do so that her employment would be terminated.

IV

The defendants deny the allegations contained in Paragraph IV of the Complaint.

V

Defendants deny the allegations contained in Paragraphs V, VI, VII, VIII and IX of the Complaint.

WHEREFORE, having fully answered all of the allegations contained in the Complaint, the defendants herein [fol. 42] demand judgment in favor of the defendants and pray that plaintiff take nothing by reason of her Complaint.

ROBERT W. PICKRELL
The Attorney General

/s/ Philip M. Haggerty
PHILIP M. HAGGERTY
Assistant Attorney General
159 Capitol Building
Phoenix, Arizona
Attorneys for Defendants

[*Duly sworn to by Philip M. Haggerty jurat omitted in printing*]

[fol. 43] * * *

[fol. 44]

MOTION TO AMEND—filed June 20, 1961

COMES NOW the plaintiff and moves to amend her Complaint in the above-entitled action, as follows:

I

Moves to amend Section I of plaintiff's Complaint, the second paragraph thereof, by adding the words AND PROPER in line four, and the words AS AMENDED in line 6, so that the second paragraph of Section I of plaintiff's Complaint reads as follows: "By reason of her being a State employee within the meaning of the aforesaid law of the State of Arizona, she is similarly situated as to all other employees of the State and therefore a suitable and proper party to bring this action on behalf

of all persons denoted within subsection B of Sec. 38-231, Chapter 2, Title 33, A.R.S. 1956, as amended."

II

Moves to amend Section II of plaintiff's Complaint, page 3, the third paragraph on page 3, by striking the word AFORESAID.

[fol. 45]

III

Moves to amend Section III of plaintiff's Complaint, page 4, third paragraph, by striking the last sentence, to-wit: "The plaintiff has been informed by the defendant trustees that unless she complies with such demand her employment will be terminated by the defendants", and substitute the words and sentence, as follows: "The plaintiff has been informed by the defendant trustees that unless she complies to the obligation to affirm or swear to the oath provided in the statute in question, her salary will be withheld in accordance with the provisions of the statute."

IV

The plaintiff moves to strike Section V and to substitute for it the following Section V, to-wit: "The plaintiff is informed and therefore believes that other defendants are demanding of their employees or subordinates immediate compliance with Sec. 28-231, Chapter 2, Title 38, A.R.S. 1956, as amended, although the effective date of the Act was March 30, 1961, and subsection C thereof [fol. 46] allows the employee elected, appointed or employed prior to the effective date of the Act, ninety (90) days after said effective date—to-wit: till June 28, 1961, within which to take and subscribe to the form of oath or affirmation.

"The plaintiff alleges that by this demand for immediate compliance, (see Exhibit "C" attached hereto and made a part hereof), the plaintiffs' rights under subsection C of said Act are being now violated."

THIS MOTION is being made in conformity with the stipulation of the parties that each party might file

amended pleadings by the end of Wednesday, June 21, 1961.

DATED this 20th day of June, 1961.

/s/ W. Edward Morgan
W. EDWARD MORGAN
Attorney for Plaintiffs
45 West Pennington
Tucson, Arizona

[fol. 47]

NOTICE OF APPEAL—filed July 3, 1961

Notice is hereby given that the above-named plaintiff appeals to the Supreme Court of the State of Arizona from the judgment entered by the above-entitled Court in the above-entitled action on June 30, 1961, wherein the Court found that Section 38-231 A.R.S. and Section 38-231 A.R.S. as amended laws of 1961, Chapter 108, Section 5, is constitutional in all respects and directed the Clerk to enter judgment in favor of the defendants and against the plaintiff on her Complaint.

DATED this 1st day of July, 1961.

/s/ W. Edward Morgan
W. EDWARD MORGAN
45 West Pennington, Suite 407
Tucson, Arizona
Attorneys for Plaintiff

Copy mailed this 3rd day of July, 1961, to:

ROBERT PICKRELL
Attorney General of the
State of Arizona
Capitol Building
Phoenix, Arizona

HARRY ACKERMAN
Pima County Attorney
Pima County Court House
Tucson, Arizona

[fol. 48]

STIPULATION FOR WAIVER OF BOND FOR COSTS ON APPEAL—filed July 10, 1961

[omitted in printing]

[fol. 49]

MEMORANDUM IN SUPPORT OF RESTRAINING ORDER—filed July 13, 1961

Two aspects of the need for an immediate restraining order address themselves from a review of the fact situation from a review of the fact situation sworn to in the verified Complaint.

I

The first and most immediate is that of the unlawful speed-up undertaken by the defendant Board of Trustees of Amphitheater Elementary School District No. 10, and, from information received by the affiant, by other members of the class of defendants included in this Complaint, of now demanding the swearing to or the affirmation of the oath provided in the statute, and of threatening immediate cessation of salary.

The statute provides that the plaintiff and all others so situated, have ninety (90) days from the effective date of the statute (March 30, 1961) to June 28, 1961, in which to sign or affirm the oath. Therefore, in order for the plaintiffs to enjoy the time allowed by the law it-[fol. 50] self, the defendants should immediately be restrained from enforcing their demands upon the plaintiffs for immediate signing or affirmation of the oath, and should immediately be restrained from denying the plaintiffs temporarily their salaries or emoluments.

II

The second aspect of the situation is that the plaintiff believes the Act to be unconstitutional. This in turn gives rise to two major legal considerations, in particular in relation to the request for immediate relief by means of a Temporary Restraining Order and Order to Show Cause:

ONE: Is there sufficient showing by the plaintiff that the Act is unconstitutional, to warrant such relief? and

TWO: Are the circumstances of the case such as to demand the immediate relief sought?

Taking the matters in reverse order, the immediate need for a restraining order should be obvious in that there is no plain, speedy relief for the plaintiff or any of the persons similarly situated, because if they refuse to [fol. 51] sign the oath or make the affirmation they will immediately be (1) condemned publicly as being subversive; (2) brought into ridicule and disgrace with a large number of people; (3) be denied the right of employment; (4) If it does not deny them the right of employment, they will immediately be without salary for their employment.

All of these consequences are immediate and direct and unless the defendants and the class of defendants are restrained, such consequences will follow.

See: A.R.S. 12-1801.

The second major consideration (Question ONE herein) is the more fundamental one, and that gives rise to the question as to the unconstitutionality of the Act. The plaintiff's position is that the Act is manifestly unconstitutional. Let us examine the various aspects of the Act as to unconstitutionality:

A. The Act is so vague as to violate the provisions of both the Arizona State Constitution and the United States Constitution guaranteeing that a criminal act [fol. 52] shall be so clear as to give due notice to the defendant of the nature of the crime. See Arizona Constitution, Article 2, Sec. 24. See United States Constitution, Amendment VI, and Amendment XIV.

1. The Act is vague as follows:

(a) What is, and who defines, a successor or organization of the Communist Party?

(b) A subordinate organization of the Communist Party? Is there any reasonable definition any place of what a subordinate organization of the Communist Party would be?

2. What is the quantum of knowledge legally sufficient to place a person within that classification of defendants who

> "had knowledge of said unlawful purpose of said organization or organizations"?

How much knowledge is knowledge of an unlawful purpose?

3. The Act is further completely vague in its administrative provisions. In Sec. 38-231, A, it provides that:

> ". . . . each board, ... shall immediately . . . . completely reproduce Sec. 38-231 . . . . to the end
> [fol. 53] that the form of written oath or affirmation required herein shall contain all of the provisions of said section for use by all officers . . . ."

It doesn't say they shall provide the oath to the officers and employees. It doesn't say whether it be their duty to take the oath to the officers and employees or what they should do after they apparently have printed up the oath.

4. Sec. 38-231 D, says in effect that if the employee does not take the oath for such period of time he shall not be entitled to any compensation. This section is ambiguous at least administratively, in that it does not provide the one who shall decide whether or not the empoyee has or has not taken an oath; it does not provide who shall order that the employee receive no further salary; it does not provide who shall decide when the employee has or has not complied with the section.

5. The Act fails as being so vague that a reasonable man could not reasonably appreciate what conduct would invoke a criminal penalty.

[fol. 54] 6. The Act is unconstitutional for being vague as a result of the disjunction between the oath contained in Paragraph G of Sec. 38-231 and Paragraph E of Sec. 38-231. "G" provides for a loyalty oath. "E" attempts to state what the meaning of the loyalty oath is.

The simple question which it puts to the light is this; If the oath is the oath that you take in "G", then why the provisions of "E"?

And if the provisions of "E" are necessary to carry out the legislative purpose, then why are they not contained in "G"?

In connection with Paragraph A, Sections 2, 3 and 4, see Am. Jur. Vol. 14, Criminal Law, Paragraphs 19 and 22. See *State* vs. *Menderson*, 57 Ariz. 103, and *U.S.* vs. *People's Fuel and Feed Co.*, 271 F 790, 41 S. Ct. 448.

B. The Act is unconstitutional.

1. The Act violates Article 1, Section 10 of the United States Constitution and Article 2, Section 25, of the Arizona Constitution as being a Bill of Attainder. [fol. 55] Bills of Attainder were considered by the United States Supreme Court in the case of *Cummings* vs. *Mo.*, 4 Wall, 277, 18 L. ed. 356 (1866) and *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366 (1866), where test oaths for attorneys, priests, candidates for public office and others who may have aided the South during the Civil War, were held to be Bills of Attainder. In *Cummings, supra*, Mr. Justice Field defined a bill of attainder as:

> ". . . a legislative act which inflicts punishment without a judicial trial . . . (the legislature is) creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals."

It will be noted that it *is the elimination of the adjudicatory process which offends the prohibition against the bill of attainder*, not the fact that the attaint was ex post facto.

Mr. Justice Field continued:

> "We do not agree with the counsel of Missouri [fol. 56] that 'to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all.' The learned counsel does not use these terms—life, liberty and property—as comprehending every right known to the law . . . . The deprivation of any rights, civil or political, *previously enjoyed, may be punishment*," 4 Wal. 320, (emphasis supplied).

In *Ex parte Garland, supra,* Mr. Justice Miller, though dissenting, defined a bill of attainder (p. 388):

> "I think it will be found that the following comprise those essential elements of bills of attainder in addition to the one already mentioned (corruption of the blood), which distinquish them from other legislation and which made them so obnoxious to the statesman who organized our government: I. They [fol. 57] were convictions and sentences pronounced by the Legislative Department of government instead of the Judicial. II. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule. III. The investigation into the guilt of the accused, if any such were made, was not necessary or generally conducted in his presence or that of his counsel and no recognized rule of evidence governed the inquiry."

This definition was clear and unequivocal. It was followed in U.S. vs. Lovett, 328 U. S. 303, 66 S.Ct. 1073, 90 L. ed. 1252 (1946). Congress denied pay to named Government employees. Mr. Justice Black wrote the opinion of the court, striking down the legislation as a bill of attainder, "a legislative act which inflicts punishment without judicial trial," (p. 315). This Court held that *Garland* and *Cummings* stand for the proposition "that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable [fol. 58] members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

The Court then went on to say:

> "The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.' The Constitution declares that that cannot be done either by a state or by the United States.
>
> "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them

guilty of conduct which deserves punishment. *They intended to safeguard the people of this country from punishment without* trial by duly constituted courts." (Emphasis supplied)

The instant case meets every test laid down by these cases. The Court in the cases cited—concerned with [fol. 59] the fact that the adjudication was by the legislature—no issue was made as to whether past, present or prospective conduct was inhibited. The acts were held to be bills of attainder.

Story, in *Commentaries on the Constitution* (5th ed., 1891) Sec. 1344, put it:

> "In such cases, the legislative assumes judicial magistry, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions."

[fol. 60] 2. The Act is also a denial of the due process of law, Article 2, Section 24 of the Arizona Constitution and of the due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

It is violative in that the plaintiffs, as with the particular plaintiff in this case, who has a contract for employment which provides that she shall receive certain remuneration, may have the remuneration denied her under the terms of this Act, without any hearing and with the gross assumption being made that if she doesn't sign the oath she must therefore be an undesirable teacher. Such an ex parte determination without the right of hearing is on its face a denial of due process.

See *Wieman* vs. *Updegraff*, 344 U.S. 183, 73 S. Ct. 215, 97 L.ed. 216.

3. The requirements of the Act are violative of Section 7, Article 2 of the Arizona Constitution, to-wit:

"The mode of administering an oath, or affirma-
[fol. 61] tion, shall be such as shall be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered."

construed with Section 12, Article 2 of the Arizona Constitution, to wit:

"No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinions on matters of religion. . . ."

The plaintiff is a person who does not believe in a double standard of truth. This belief is predicated upon the moral philosophy of her religion and she therefore may not make either an oath or an affirmation without violating her religious conscience.

In *Adler* vs. *Board of Education*, 342 U.S. 485, 72 S. Ct. 380, 96 L. ed. 517, a case involving the question of the right of the State to screen its teachers, the Court discussess procedural due process and points out that mere membership in the Communist Party only gave rise [fol. 62] to a presumption of unfitness. However, the State provided for a hearing and it was a rebuttable presumption and therefore as long as it was rebuttable there was not a denial of procedural due process.

"Disqualification follows therefore as a reasonable presumption from such membership and support. *Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has fully opportunity to rebut.* The holding of the Court of Appeals below is significant in this regard:

" 'The statute also makes it clear that . . . . proof of such membership 'shall constitute prima facie evidence of disqualification' for such employment.' "

In *Potts* vs. *Pardee* (220 NY 431, 433, 116 NE 78, 8 ALR 785, 17 NCCA 427):

"The presumption growing out of a *prima facie*
[fol. 63] case . . . remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears and, unless met by further proof, there is nothing to justify a finding based solely upon it." Thus the phrase "*prima facie* evidence of disqualification," as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* eivdence for which subdivision 2 of Section 3002 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence.

(Civil Service Law Section 12-a, subd. (d)).

[fol. 64] " 'Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process.' 301 NY 476, at p. 494, 95 NE (2d) 806, at 814, 815." (Emphasis added).

In our State, the penalty is created by forcing a party not to sign the oath and then subjecting him to the penalty of either denial of employment or denial of salary, without any hearing being afforded to allow the person to overcome the presumption given rise to by the failure to take the oath.

No exceptions are built into the oath taking. For example, what of the innocent professor, who, in the course of his sociological studies, remains a member of such an organization?

What about those parties who may be involved in counter-espionage?

Where there is no such provision for explanation of
[fol. 65] one's membership, then there is a denial of procedural due process.

THE RELATION OF MORALS AND THE BILL OF RIGHTS.

The Bill of Rights to the United States Constitution and the Bill of Rights of those states which have copied the United States Constitution are fundamentally not a statement of law but rather a statement of morals—a statement of the natural law of man, and wherever there is a violation, in the mind of men, of what is fundamentally right, there is also a discernible violation of the provisions of the Bill of Rights.

On the question of a class action, the Complaint asks that the action be considered as a class action as to plaintiffs and as to defendants. For general authority on this matter, we refer the Court to 39 Am. Jur. 919 and to 28 Am. Jur. Par. 260, Defendants.

[fol. 66] ORDER

Plaintiff's Motion to Amend having been filed prior to June 21, 1961, therefore, in accordance with the stiuplation of the parties,

IT IS HEREBY ORDERED that the plaintiff's Complaint is amended as moved for in plaintiff's Motion to Amend.

DONE IN OPEN COURT THIS —— DAY OF JUNE, 1961.

Judge of the Superior Court

Copy of the Motion to Amend and Order
mailed this 20th day of June, 1961, to:

ROBERT PICKRELL
Attorney General of the State of Arizona
The Capitol Building
Phoenix, Arizona
Attn: Clark Kennedy, esq.

HARRY ACKERMAN
County Attorney of Pima County
Tucson, Arizona
Pima County Court House

(FILED: July 13, 1961.)

[fol. 67]

STIPULATION OF FACTS—filed July 13, 1961

IT IS AGREED that a contract was entered into on the 24th day of April, 1961, in the City of Tucson, County of Pima, and State of Arizona, by and between BARBARA ELFBRANDT and IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, duly elected members of and acting on behalf of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona; said BARBARA ELFBRANDT became and is employed by the Amphitheater Elementary School District No. 10 as a teacher, for the period commencing August 31, 1961, through June 7, 1962.

IT IS FURTHER AGREED that the said BARBARA ELFBRANDT was and is a continuing teacher within the meaning of Sections 15-251 and 15-252 A.R.S. 1956, as amended, of the Arizona Revised Statutes, during all times pertinent to the instant litigation and is a person covered within the meaning of the provisions of A.R.S. 38-231, 1956, as amended, and subject to the provisions of that act.

[fol. 68] BARBARA ELFBRANDT refused and will continue to refuse to affirm or swear to the oath set forth in 38-231, A.R.S. 1956, as amended.

IT IS FURTHER AGREED that the named defendants herein will obey and carry out the express requirements of 38-231 A.R.S. 1956, as amended, as they may apply to these plaintiffs and all others similarly situated.

IT IS FURTHER AGREED that the provisions of this act, as they apply to the class of plaintiffs denominated herein, affect the present employment opportunities of such plaintiffs and all other persons who may become employees of the defendants. The defendants contemplate the hiring of numerous and sundry other persons and are at the time of this agreed statement of facts engaged in entering into contractual relationships with this class of plaintiffs and will continue to enter into such contractual

relation with other persons similarly situated to the plaintiffs.

DATED this —— day of ————, 1961.

APPROVED AND STIPULATED TO BY:

[fol. 69]

ROBERT W. PICKRELL
Attorney General
State of Arizona

By /s/ William C. Kennedy
Date: June 27, 1961

HARRY ACKERMAN
County Attorney
State of Arizona

By /s/ Harry Ackerman
Date: June 29, 1961

W. EDWARD MORGAN
Attorney for Plaintiff

By /s/ W. Edward Morgan
Date: June 29, 1961

[fol. 70]

DESIGNATION OF RECORD—filed July 21, 1961

[omitted in printing]

[fol. 71] MINUTE ENTRIES

June 16, 1961:

Timothy J. Mahoney, Judge.

IT IS ORDERED that the prayer requesting that the temporary restraining order be made permanent pendente lite is hereby denied.

June 30, 1961:—Judgment

Timothy J. Mahoney, Judge.

This matter having been submitted upon a stipulation of facts and the Court being advised in the premises does find that Section 38-321, A.R.S., and Section 38-231 as amended, Laws of 1961, Chapter 108, Section 5, is constitutional in all respects, and the Clerk is hereby directed to enter judgment in favor of the defendants and against the plaintiff on her Complaint.

July 12 1961:

Lee Garrett, Judge.

IT IS ORDERED that the Clerk of the Superior Court transmit the original papers and portions of record constituting the record on appeal to the Supreme Court in lieu of carbon copies of same, and request that same be [fol. 72] returned to the office of the Clerk of the Superior Court when the Supreme Court has arrived at its decision in the matter.

* * * *

CLERK'S CERTIFICATE ON MINUTES

[omitted in printing]

[fol. 73]

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

En Banc

No. 7406

BARBARA ELFBRANDT, for herself and others similarly situated, APPELLANTS

v.

IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona; PAUL J. FANNIN, Governor of the State of Arizona; ROBERT W. PICKRELL, Attorney General of the State of Arizona; JEWEL W. JORDAN, State Auditor; LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELWOOD W. BRADFORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS, and LEON LEVY, members of the Board of Regents; W. W. DICK, State Superintendent of Public Instruction, and PAUL J. FANNIN, Governor, ex-officio members of the Board of Regents; FLORENCE REECE, Pima County Superintendent of Schools; ROBERT D. MORROW, Superintendent of Tucson School District #1; JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WILLIAM J. PISTOR, School Board, Tucson District #1; RICHARD A. HARVILL, President of The University of Arizona, APPELLEES

Appeal from the Superior Court of Pima County
The Honorable T. J. Mahoney, Judge

Judgment Affirmed

Morgan & Rosenberg, Tucson
Attorneys for Appellant

Robert W. Pickrell, The Attorney General,
Philip M. Haggerty, Assistant Attorney General
and Harry Ackerman, Pima County Attorney
Attorneys for Appellees

OPINION—May 1, 1963

STRUCKMEYER, Justice.

Appellant as a teacher in the Arizona Public School System at Tucson is required by A.R.S. § 38-231 and § 38-233 as amended by Chapter 108, Laws of 1961 to subscribe to the oath required of all public officers and employees [See Appendix]. This she has refused to do. She [fol. 74] brings this action for herself and for others similarly situated seeking a declaration that the Arizona Officers and Employees Loyalty Oath deprives her of rights guaranteed under the state and federal constitutions. The cause was submitted to the lower court on stipulated facts and the appeal is from its judgment holding the challenged portions of the amended statutes constitutional.

From the time of this State's inclusion as a territory in 1863 every public officer as a condition of employment and before entering upon the duties of his office has been required to take and subscribe to an oath differing but slightly from that now specified in A.R.S. § 38-231. The territorial oath was in this language:

> "I, ————————, do solemnly swear that I will support the Constitution of the United States and the laws of this Territory; that I will true faith and allegiance bear to the same, and defend them against all enemies whatsoever, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my abilities, so held me God." Chapter XXV Sec. 4, Howell's Arizona Code, 1864.

We pause here only to note that because the Arizona Declaration of Rights, Art. 2, § 7, Constitution of Arizona permits public officers and employees to either swear or affirm in a manner most consistent with and binding upon the conscience of the person, the compulsive subscription does not impinge on religious or conscientious scruples.

As a generality, it can be said that qualifications for public officers and employees of the state may be fixed by the legislature where not otherwise prescribed by the State

Constitution. McCarthy v. State, 55 Ariz. 328, 101 P.2d 449; Campbell v. Hunt, 18 Ariz. 442, 162 P.2d 882. The power to prescribe qualifications of public officers and em- [fol. 75] ployees is essential to the independence of the states and to their peace and tranquility and should be free from external interference unless conflicting with the Constitution of the United States. Taylor v. Beckham, 178 U.S. 548, 44 L.Ed. 1187, 20 S.Ct.890. Where there are suitable reasons, positions of public importance may be denied to groups of persons identified by their particular interests. Board of Governors of Federal Reserve System v. Agnew, 329 U.S. 441, 91 L.Ed. 408, 67 S.Ct. 411. We do not doubt that the legislature in order to preserve the integrity of the public service and safeguard it from disloyalty may enact statutes designed to reasonably attain those ends. Loyalty may be a prescribed qualification for the holding of public employment. Adler v. Board of Education, 342 U.S. 485, 96 L.Ed. 517, 72 S.Ct. 380, 27 A.L.R.2d 472.

Under constitutional government oaths similar in context to that here have been considered as an appropriate means to bind the individual. As has often been pointed out the President of the United States is required to take this oath or affirmation:

> "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." Constitution of the United States, Art. 2, Sec. 1.

For centuries the oath was a pledge of fealty to the king. It does "not increase the civil obligation to loyalty; it only strengthens the *social* tie by uniting it with that of *religion*" 1 Blackstone's Commentaries (16th Ed.) 369. It is considered as an expression of devotion to the government, an express engagement of that which every citizen owes to his country, Imbrie v. Marsh, 5 N.J. Super. 239, 68 A.2d 761; Affirmed 3 N.J. 578, 71 A.2d 352, 18 A.L.R.2d 241; for as stated by Justice Story in 1838:

[fol. 76] "Oaths have a solemn obligation upon the minds of all reflecting men, and especially upon those who feel a deep sense of accountability to a Supreme Being." 2 Story, Commentaries on the Constitution of the United States (5th ed.) 613, § 1844.

As such it is an appeal to God to witness the truth of what is declared and an imprecation of divine punishment if what is said is false. See 18 A.L.R.2d 268.

We find nothing within the express language of the oath to which all may not conscientiously and with devotion to the government subscribe.

There is, however, incorporated within the oath a promise that the public officer or employee is not presently engaged in and in the future will refrain from certain conduct.

> "Any officer or employee * * * having taken the * * * oath or affirmation * * * knowingly or wilfully at the time of subscribing * * * or * * * thereafter during his term of office * * * does commit or aid in the commission of any act to overthrow by force or violence the government of this state or * * * advocates the overthrow by force or violence * * * or becomes * * * a member of the communist party * * * or its successors or any of its subordinate organizations * * * having for one of its purposes the overthrow by force or violence of the government of the state of Arizona * * * shall be guilty of a felony and upon conviction * * * subject to all the penalties for perjury; * * *." § 38-231 E.

The legislature has recognized that it is not to everyone the taking of an oath bears a deep sense of accountability to a supreme being and therefore has provided more worldly penalties to compel adherence. It has in effect said that the doing of the proscribed acts constitutes a failure to support the constitution and the laws of the state and to defend them against their enemies. When confronted with the problem of the state's interest in se-[fol. 77] curity, santions may be supplied to coerce and deter its enemies from seeking or holding public employment. Garner v. Board of Public Works of Los Angeles,

341 U.S. 716, 95 L.Ed. 1317, 71 S.Ct. 909. The state may demand an oath of a person seeking public office that he is not engaged in the commission of any act to overthrow by force or violence the government of the state or any of its political subdivisions. Gerende v. Board of Supervisors of Elections of Baltimore, 341 U.S. 56, 95 L.Ed. 745, 71 S.Ct. 565.

What we have said here would ordinarily dispose of this action for we do not entertain attacks on the constitutionality of a statute by those whose rights have not in some way been actually or injuriously affected or directly involved, Gherna v. State, 16 Ar. 344, 146 P. 494, Anno. Cas. 1916 D 94. But in this instance we recognize the problem to appellant is one of potential deterence of constitutionally protected conduct. The compulsion of the oath weighs most heavily on those whose scruples are the most sensitive. See Cramp v. Board of Public Instruction, 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct.275. Accordingly, we reach the constitutional questions raised, but neither expressly nor by implication do we pass judgment upon Section 4 of Chapter 108 considering that the mere existence of a criminal statute is not such a threat as to present a justiciable controversy. cf. Hitchcock v. Kloman, 196 Md. 351, 76 A.2d 582.

The attacks directed against this oath question nearly every conceivable constitutional aspect. Not all merit serious consideration. For example, there is here no indiscriminate classification of innocence with knowing ac- [fol. 78] tivity as was found offensive in Wieman v. Updegraff, 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215. Consistent with our interpretation, in part stated hereafter, it does not have the unconstitutional vice of vagueness and indefiniteness in placing an accused on trial for an offense, the nature of which he is given no fair warning, for punishment is restricted to specified acts knowingly and wilfully committed. cf. American Communications Assn. v. Douds, 339 U.S. 382, 413, 94 L.Ed. 925, 70 S.Ct. 647.

It does not violate any rights protected by the Fifth, and Sixth Amendments to the Constitution of the United States for neither are there penalties imposed for past activities nor is appellant required to divulge her past

activities or associations. Ullman v. United States, 350 U.S. 422, 100 L.Ed. 511, 76 S.Ct. 497, 53 A.L.R.2d 1008. The Act is not a Bill of Attainder imposing punishment without conviction in the course of judicial proceedings. Here a person who has in the past engaged in the prohibited conduct can escape punishment by altering the course of his present activities. cf. Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 6 L.Ed. 2d 625, 81 S.Ct. 1357.

Since the oath to which appellant has refused to subscribe has had reproduced upon it all of § 38-231, she has been clearly warned of the consequences of her refusal. There is not here a want of substantive due process. cf. In re Anastaplo, 366 U.S. 82, 6 L.Ed.2d 135, 81 S.Ct. 978. While § 38-233, requires that the oath be filed of record, it does not contemplate that the filing be rejected by the public officer in charge of the board or agency with which the filing is required. There is, hence, no [fol. 79] denial of procedural due process. cf. Speiser v. Randall, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332.

We assume that the legislature was not unaware of the decisions of the Supreme Court of the United States and therefore used the word "advocate" as meaning concrete action for forceful overthrow of the government rather than principles divorced from action. Scales v. United States, 367 U.S. 203, 6 L.Ed.2d 782, 81 S.Ct. 1469; Yates v. United States, 354 U.S. 298, 1 L.Ed. 2d 1356, 77 S.Ct. 1064; Dennis v. United States, 341 U.S. 494, 95 L. Ed. 1137, 71 S.Ct. 857.

The most troublesome question to be settled is the collision arising between individual liberties protected by the First Amendment to the Constitution of the United States and the use of the police power of the state seeking to protect its citizens from potential calamity. On this issue some general observations point up the conclusions reached.

The police power of the state is the power vested in its legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes, and ordinances either with penalties or without as shall be judged to be good and for the wefare of the state and its residents.

Sweet v. Rechel, 159 U.S. 380, 40 L.Ed. 188, 16 S.Ct. 43. It is the authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state. Mutual Loan Co. v. Martell, 222 U.S. 225, 56 L.Ed. 175, 32 S.Ct. 74, Anno. Cas. 1913 B 529. While the police power is the most essential and insistent power of government, rights recured or protected by the United [fol. 80] States Constitution can not, of course, be overthrown or impaired by its exercise, Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 46 L.Ed. 679, 22 S.Ct. 431. Still,

> "* * * Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights." Justice Holmes in Noble State Bank v. Haskell, 219 U.S. 104, 55 L.Ed. 112, 31 S.Ct. 186, 32 L.R.A. [N.S.] 1062, Anno. Cas. 1912 A 487.

The command of the First Amendment requires that speech be fought with speech and falsehoods and facllacies be exposed, not suppressed, unless there is insufficient time to avert the evil consequences of noxious doctrines by argument and education. American Communications Assn. v. Douds, supra. It is too well settled for argument that the right or privilege of free speech has its limitations. Stromberg v. California, 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532, 73 A.L.R. 1484. As has been pointedly observed, constitutionally protected freedom of speech is narrower than an unlimited license to talk.

In Dennis v. United States, supra, the test for determining acceptable limitations on free speech was stated as being that the decision must be based upon "whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." A somewhat different approach was used in the later case of Konigsberg v. State Bar of California, 366 U.S. 36, 6 L.Ed.2d 105, 81 S.Ct. 997:

> "On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. See, e.g., Schenck

> v. United States, 249 U.S. 47, 63 L.Ed. 470, 39 S.Ct. 247; Chaplinsky v. State of New Hampshire, 315 U.S. 568, 86 L.Ed. 1031, 62 S.Ct. 766; Dennis v. United States, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857; Beauharnais v. People of State of Illinois, 343
> [fol. 81] U.S. 250, 96 L.Ed. 919, 72 S.Ct. 725; Yates v. United States, 354 U.S. 298, 1 L.Ed. 2d 1356, 77 S.Ct. 1064; Roth v. United States, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304. On the other hand, general regulatory statutes, not intended to control the content of speech but incidently limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. * * *"

We recognize the prohibited conduct in denying membership in the enumerated organizations diminishes the individual's freedom of association and hence the unfettered communication of ideas, but whatever test be applied, constitutional restraints are satisfied. The conduct sacrificed to governmental interests only minimally and incidentally conflicts with the First Amendment. The gravity of the evil sought to be reached, discounted by its improbability, justifies the invasion.

In considering the amended statutes we are conscious of the principle that courts are not concerned with the wisdom of legislation. Bohannan v. Corporation Commission, 82 Ariz. 299, 313 P.2d 379. Nor is it within our province to decide the propriety or expediency of the law. These are matters for the legislature's determination. We look to discover whether there is a basic for the enactments, Schrey v. Allison Steel Mfg. Co., 75 Ariz, 282, 255 P.2d 604 consistent with the scope of the First Amendment.

The State, an integral part of the nation, has enemies capable of nearly instantaneous devastation, the sworn foe of republican government and all democratic processes [fol. 82] who have publicly vowed to "bury" us. Only the want of an opportune time defers the moment of the

thermonuclear first strike. Self-preservation makes it the concern of all and the particular duty of public employees to be alert against internal weakening of the state government. It is to be observed that public officials and employees as the normal leaders in community affairs are sensitive to and the target of proselytization. Their possible failure in the performance of duties can but be attendant with the gravest consequences. The state's interest demands that public employees refrain from associations out of which even unconscious corruption may comfort those who seek world domination. Even memberships in the forbidden organizations lend the influence of the members' names and offices to all aims and purposes. We need go no further; the evil sought to be restrained is evident.

The language of § 38-231 E as amended has no relationship to beliefs. It prohibits any membership in any organization having for *one* of its purposes the overthrow by force and violence of the government of the State of Arizona or any of its political subdivisions including passive and nominal memberships. cf. Scales v. United States, 367 U.S. 203, 6 L.Ed.2d 782, 81 S.Ct. 1469. It makes criminal after the taking and subscription to the oath all memberships in all organizations engaging in illegal advocacy. There is no imputation that public officers and employees may hold or retain memberships for exclusively lawful purposes. The risk that the insiduous poison may be here spread is not one the people of the state are willing to accept

In arriving at our conclusions we have considered that the legislature has created a new crime, a felony, where [fol. 83] none before existed, one which severely penalizes the formal act of association with certain groups. The critical act forbidden is the knowing or wilfull joining or remaining a member of an organization with knowledge of the illegal purpose. The memberships contemplated by the statute obviously must be determined not by conduct from which an inference may be drawn but by objective acts of joining and acceptance as members. cf. Killian v. United States, 368 U.S. 231, 7 L.Ed.2d 256, 82 S.Ct. 302. No other interpretation is consistent with the spirit of the act.

The legislative has declared by § 38-231 E that an officer or employee shall not be entitled to compensation unless and until such officer or employee does take and subscribe to the form of oath. We construe the legislative intent as purely regulatory, meaning that when a proper affidavit is filed compensation shall be paid in full for past services.

The judgment of the court below is affirmed.

FRED C. STRUCKMEYER, JR., Justice

CONCURRING:

JESSE A. UDALL, Vice Chief Justice

LORNA E. LOCKWOOD, Justice

[fol. 84]

BERNSTEIN, Chief Justice (Specially Concurring)

I agree with the following propositions developed in the majority opinion: 1. Loyalty to the state may be a prescribed qualification for the holding of a public office or of public employment. 2. The legislature may provide criminal sanctions to prohibit and deter enemies of the state from seeking or holding public employment. 3. The legislature has the power to proscribe subversive speech or conduct as well as the knowing or wilful joining or remaining a member of an organization which has for one of its purposes the overthrow of the government by force

or violence with knowledge of such illegal purpose. 4. The restriction of the first amendment freedoms of speech and association resulting from such legislation is justified by the clear and present danger which subversion poses to the survival of our free way of life. Furthermore, I agree that, subject to the limitations which I will point out, a loyalty oath may be made a part of the legislative scheme to determine and insure the loyalty of state officers and employees. Thus, my concern is not with *whether* the state can act to supress disloyal conduct and speech, and to eliminate disloyal employees, but with *how* it may act to accomplish these ends.

It is axiomatic that in all of its legislative endeavors, a state must act with due process of law. I do not believe the plaintiff's contention that procedural due process is denied her can be fairly dismissed, as in the majority opinion, with the statement that there is no denial of procedural due process, since the statute does not permit the official with whom the oath is filed to reject it. Speiser [fol. 85] v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed. 2d 1460 (1958), cited by the majority, does not purport to define the outer limits of procedural due process.

One of the contentions of the plaintiff is that this legislation is unconstitutional because it fails to provide a hearing at which her refusal to take the oath may be explained. The majority opinion leaves the arguments of the plaintiff unanswered.[1] In my view, this contention raises the most serious issue in this appeal.

The plaintiff has a constitutional right not to be excluded from public employment for an arbitrary or discriminatory reason, Wieman v. Updegraf, 344 U.S. 183, 192, 73 S.Ct. 215, 97 L.Ed. 216 (1952) or an unconstitutional reason, Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed. 2d 285 (1962). A legitimate reason for her exclusion from public employ-

[1] The U.S. Supreme Court has never ruled on this issue but has indicated its concern with it, Nostrand v. Little, 362 U.S. 474, 80 S.Ct. 840, 4 L.Ed. 2d 892 (1960); Nostrand v. Little, 368 U.S. 436, 82 S.Ct. 464, 7 L.Ed. 2d 426 (1962). See also Nostrand v. Little, 58 Wash. 2d 111, 361 P.2d 551 (1961).

ment,[2] and the reason which provides the police power justification for this legislation, is the elimination of disloyal persons from critical and sensitive positions in our public schools, Adler v. Board of Public Education, 342 [fol. 86] U.S. 485, 72 S. Ct. 380, 96 L.Ed. 517 (1952). If however, her exclusion is based not upon a showing of disloyalty, but upon grounds of religion or conscience, she is excluded for arbitrary and discriminatory reasons—reasons which are not justified bases for the exercise of the police power. Thus, the critical question seems to me to be: Can the state, in pursuing the legitimate goal of eliminating disloyal persons from public employment, choose a method which in practical effect also eliminates those who are not shown to be disloyal?

The plaintiff, in a memorandum submitted in the lower court, has stated that her reason for refusing to take the oath is that she feels it conflicts with the moral philosophy taught by her religion. She states she cannot make either an oath or affirmation without violating her religious conscience.

Certainly the plaintiff may not claim exemption from every form of oath on grounds of conscience. The requirement of some oaths is written into the Constitution itself, and so established, transcends all questions of due process, U.S. Const. Art. VI, § 3. Cf. Arizona Const. Art. VI, § 27.

> "Clearly the constitution permits the requirement of oaths by office holders to uphold the constitution itself. The obvious implication is that those unwilling to take such an oath are to be barred from public office. For the President, a specific oath was set forth in the constitution itself. Art. II § 1. And congress has detailed an oath for other federal officers. Ob-

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[2] The legislature has chosen a curious method of enforcement of the oath requirement which permits those who refuse to take the oath to continue in their positions without pay. Dedicated subversives who may be supported by their organizations can continue their nefarious work in sensitive positions of public employment. For those unsubsidized persons who object to the oath for reasons of conscience, termination of pay is tantamount to discharge from employment, and must be so considered.

> viously the Framers of the Constution thought that the exaction of an affirmation of minimal loyalty to the Government was worth the price of whatever deprivation of individual freedom of conscience was involved . . . ." American Communications Ass'n v. Douds, 339 U.S. 382, 415, 70 S.Ct. 674, 94 L.Ed. 925 (1950)

[fol. 87] If there was involved here only the express oath of A.R.S. § 38-231 G, an oath which the plaintiff appears to have subscribed without complaint prior to the 1961 embellishments, I would say it was merely an affirmation of minimal loyalty which may be required under constitutional precedent. But the 1961 oath has much greater significance than its predecessor, although the express wording is virtually unchanged. It is now inextricably interwoven with the criminal provisions of A.R.S. § 38-231 E. If the oath taker is already engaged in the activities proscribed by subsection E, taking the oath is the act that makes her a criminal. If she engages in these activities after she takes the oath she is guilty of this crime because she has taken the oath. Moreover, the act requires that the criminal provisions be conjoined with the oath form that must be signed. The majority opinion realistically characterizes the relationship between certain provisions, as would be the case if, for example, the criterion "promise that the public officer or employee is not presently engaged in and in the future will refrain from certain conduct."

This is not to suggest that the state cannot create the crime defined in A.R.S. § 38-231 E., or that it cannot make this crime applicable only to state officers and employees. As they have been interpreted in the majority opinion, the criminal provisions of the act may be a valid exercise of the police power. Furthermore, if the criminal provisions were completely divorced from the oath provisions, as would be the case if, for example, the criterion of the class to which they applied was defined to be "all state officers and employees," the oath would remain a simple affirmation of minimal loyalty. My point is this: In making the oath the element without which there can be [fol. 88] no criminal offense, and in requiring that each

officer and employee perform this elements of the offense as a condition of public employment, the legislature has removed the oath from that class of affirmations of minimal loyalty which may be required without regard to discrimintory effect.[3] Now the standards of due process must be satisfied.

Most Americans take a loyalty oath with a feeling of patriotic pride and satisfaction. Nevertheless, there are those whose loyalty is unquestioned who, in sincere conscientious conviction refuse to subscribe to such oaths. For some, the objection is grounded in relgious beliefs,[4] for

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[3] That even the simplest of oaths of loyalty may operate in a discriminatory manner cannot be denied. The man whose religious beliefs preclude him from taking any oath or affirmation of loyalty to a sovereign other than God, or who takes literally the scriptural admonition: "Swear not at all, neither by heaven; for it is God's throne, Nor by the earth; for it is his footstool: * * * But let your communication be Yea, yea, Nay, nay; for whatsoever is more than these cometh of evil." (Matt. 5:34-35, 37.) though he be preeminently qualified in all other respects, cannot qualify to be President of this nation, U.S. Const. Art. II, § 1, nor judge of this court, Ariz. Const. Art. VI, § 27, nor serve in other federal or state offices, U.S. Const. Art. VI, § 3. He is excluded because of his religious beliefs, a type of discrimination which would be condemned by due process principles if the requirement of these simple oaths was not written into the Constitutions under which our nation and state were organized.

[4] See, e.g. the following statements of two public employees who refused to take a Pennsylvania loyalty oath similar in tenor to that now before us:

> "I am by conviction, a Christian pacifist and am therefore opposed to the use of violent means for the achievement of any end, no matter how righteous. Certainly not for the overthrow of our Government which I love and cherish. I could therefore with perfect truthfulness take this oath. My objection to the Oath is that I feel its effect will be to curb freedom of thought and expression: a curb which we expect in communist countries but which is directly contrary to the spirit and practice of Democracy. During the long legislative struggle over this Bill, many teachers have been afraid to voice their opposition to it for fear of being suspected of subversion. This forcibly illustrates to me the fact that the Bill is producing, among many, a timid conformity instead of the free thinking and discussion on which the stability and progress of our nation

[fol. 89] others upon the concepts of academic or intellectual freedom.[5] There are undoubtedly other reasons for refusal to take the oath. However much we may disagree with the logic or reasonableness of these obejctions, we must admit that they do not prove disloyalty.

[fol. 90] If, under this legislation there were no opportunity for those coming within its provisions to explain their refusal to take the oath, it would operate with equal vigor to eliminate the disloyal and the con-

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rests . . . . for these reasons I cannot conscientiously support this Act. . . ."

Similarly:

"That the actual words of the Pennsylvania Loyalty Oath are relatively innocuous is a tribute to the resistance of a free people and their representatives against coercive forces that would cast our very thoughts in a mold of conformity, mechanization and violence. In spirit, however, the Oath is one of several instruments by which we are being 'persuaded' that totalitarian regimentation must be met by totalitarian, 100 per cent 'Americanism'. In a day when the impulse to conform, to acquiesce, to go along, is the instrument used in subjecting men to dictatorial rule throughout the world, non-conformity—with a religious motivation—becomes a means of preserving the dignity of man. Although I am neither communist nor subversive, I must say 'No' to the spirit of the Oath. Through the years Quakers have continuously declared loyalty of citizenship, but the superficial and unreal implication that we have only to close our minds to Communism in order to save America is false and dangerous." Byse, Report on Pennsylvania Loyalty Act, 101 U.Pa. L.Rev. 480, Note 5 (1953).

[5] See Mr. Justice Douglas' dissenting opinion in Adler v. Board of Education, 342 U.S. 485, 508, 72 S.Ct. 380, 96 L.Ed. 517 (1952) which contains a forceful argument for academic freedom. And cf. the October 17, 1962 Associated Press report of President Kennedy's comments when he signed into law a bill removing the requirement of a disclaimer affidavit (loyalty oath) from the National Science Foundation and National Defense Education Acts. The President stated he was glad to sign the law, and noted that 32 colleges and universities had refused to participate in the programs because of the disclaimer provisions. He was quoted: "It is highly unlikely that the affidavit requirement kept any communist out of the programs. . . . It did, however, keep out those who considered the disclaimer a bridle upon freedom of thought." *Arizona Republic* Oct. 18, 1962.

scientious. But there has been no suggestion that the national security is in clear and present danger from those of unbending religious conscience or from champions of academic freedom. We must remember that the sole police power justification for this legislation is to eliminate disloyal persons from public office and employment.

Viewed in another way, an oath requirement without provision for a hearing would create an irrebutable presumption that one who refuses to take the oath is disloyal. Refusal to take the oath would be a conclusive ground of disqualification from public employment, yet the only qualification which is established by the act is loyalty. A statute which operates to deny a fair opportunity to rebut the presumption raised by its provisions is offensive to due process, Manley v. State of Georgia, 279 U.S. 1, 49 S.Ct. 215, 73 L.Ed. 575 (1928); City of Seattle v. Ross, 54 Wash. 2d 655, 344 P.2d 216 (1959); People v. Wells, 33 Cal. 2d 330, 202 P.2d 53 (1949); See State v. Childress, 78 Ariz. 1, 274 P.2d 333 (1954).

In Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517 (1952), a statute made membership in organizations listed as subversive prima facie evidence of disqualification for employment as a teacher. The Supreme Court said:

> "Membership in a listed organization found to be within the statute * * * is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say [fol. 91] that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. *Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it.* * * * Thus the phrase 'prima facie evidence of disqualification' as used in the statute imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to

present substantial evidence contrary to the presumption. * * *" 342 U.S. at 494, 495. (Emphasis added.)

If *membership in a subversive organization* cannot create a conclusive presumption of disqualification for public employment, much less can refusal to sign this loyalty oath be made conclusive grounds for disqualification.

The refusal to speak cases are also instructive on this issue. In Slochower v. Board of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956), the Supreme Court was faced with a provision of the charter of the City of New York which made a public employee's invocation of the self-incrimination privilege in an investigation dealing with his official conduct grounds for termination of the employment. The court held the provision invalid because, "in practical effect the questions asked are taken as confessed and made the basis of the discharge," 350 U.S. at 558. Thus, refusal to speak cannot be taken as presumptive evidence of guilt of the acts inquired into. In three cases in which the Supreme Court upheld discharge of public employees because of their refusal to answer questions concerning possible subversive associations, the court was careful to emphasize, in each case, that dismissal was based not upon an unpermitted inference of guilt arising from the refusal to answer, but upon other grounds, Beilan v. Board of Education, 357 U.S. [fol. 92] 399, 78 S.Ct. 1317, 2 L.Ed. 2d 1414 (1958) (dismissal upon statutory ground of incompetence as broadly interpreted by state court); Lerner v. Casey, 357 U.S. 468, 78 S.Ct. 1311, 2 L.Ed. 2d 1423 (1958) (dismissal for "doubtful trust and reliability" and "lack of candor"); Nelson v. County of Los Angeles, 362 U.S. 1, 80 S.Ct. 527, 4 L.Ed. 2d 494 (1960) (dismissal based upon a statutory ground of "insubordination"). In the present case, refusal to sign the oath is the basis of the unpermitted inference of guilt (i.e. disloyalty).[6]

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[6] While we need not here decide whether the legislature could require the discharge of those who refuse to take an oath on the basis of "insubordination," there is in my mind a significant difference between discharging an employee for failure to disclose information relevant to his qualifications for employment, as in the

For these reasons, while the legislature may utilize an oath to determine the loyalty of persons in public employment, it may not, in a loyalty requirement such as this, make refusal to take the oath a conclusive basis for exclusion from public employment. Those who refuse to take the oath for reasons other than disloyalty must be given an opportunity to explain their refusal. The burden remains with the state to prove the disloyalty of those excluded from public employment, cf. Speiser v. Randall, supra.

We recently indicated that a legislative act providing for the suspension of automobile registrations and driver's licenses under specified conditions, would be unconsti- [fol. 93] tutional unless a hearing would be granted, if sought, in which the factual determination of those specified conditions would be made, Schecter v. Killingsworth, —— Ariz. ——, —— P.2d —— (1963) [No. 7533]. A right not to be discriminately discharged from public employment is as important and as protected a right as the right to drive on the public highway. Here too, the factual determination of the condition which justifies discharge, disloyalty, must be made at a hearing if requested.

The plaintiff is a continuing teacher (i.e. one with tenure) within the meaning of A.R.S. § 15-251. She therefore is entitled, if she so requests, to a hearing under A.R.S. § 15-254,[7] before she may be discharged from her

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cases cited, and discharging an employee for his refusal to do an act which is repugnant to his conscience and which, under such circumstances, is not relevant to his qualifications for employment.

[7] " § 15-254. Hearing on dismissal

Within fifteen days after receipt of notice of dismissal or termination, a continuing teacher may serve upon a member of the school board or the superintendent, a written request for either a public or private hearing before the board. The hearing shall be held by the board not less than ten nor more than fifteen days after the request is served, and notice of the time and place of the hearing shall be given the teacher not less than three days prior to the date of the hearing. At the hearing the teacher may appear in person and by counsel, if desired, and may present any testimony, evidence or statements, either oral or in writing, in his behalf. Within ten days following the hearing the board shall

teaching position,[8] cf. Nostrand v. Little, 58 Wash.2d 111, 361 P.2d 551 (1961). If at such hearing, her explanation of her refusal to take the oath is sufficient to rebut any presumption of disloyalty arising therefrom, and if no additional evidence of disloyalty is adduced by the state, she is, in my opinion, entitled to be reinstated and to re-
[fol. 94] ceive any compensation withheld under the provisions of A.R.S. § 38-231.[9] By this construction the constitutionality of this legislation may, in this case, be upheld and the judgment affirmed. Otherwise I would be compelled to dissent on the constitutionality of the statute.

CHARLES C. BERNSTEIN
Chief Justice.

[fol. 95]

JENNINGS, Justice.

I agree with Chief Justice Bernstein that without some provision for a hearing at which the plaintiff can explain her refusal to take the oath, the loyalty oath requirement would be unconstitutional. I am not, however, willing to decide at this point that the tenure hearing provided by A.R.S. § 15-254 is sufficient to preserve the constitutionality of the oath statute. Chief Justice Berstein's view of the availability and scope of the tenure hearing is a minority view on this court, and would remain so even if I were to join him in his interpretation of the tenure

determine whether there existed good and just cause for the notice of dismissal and shall render its decision accordingly, either affirming or withdrawing the notice of dismissal or termination. Good and just cause shall not include religious or political beliefs or affiliations unless in violation of the oath of the teacher."

[8] I consider withholding of compensation tantamount to discharge, supra, note 2.

[9] The record fails to show that the plaintiff has requested a tenure hearing, or that such hearing would not result in full reinstatement and the restoration of compensation withheld.

statutes. Furthermore, the plaintiff has not requested a tenure hearing, and we have heard no argument on the scope and effect of such a hearing.

If the plaintiff is indeed entitled to a hearing under the tenure act, she has not exhausted this administrative remedy. I am therefore of the view that it is inappropriate to finally determine the constitutionality of the oath statute as applied to the plaintiff until she has requested an administrative hearing and the outcome of that request is part of the record upon which our decision can be based.

RENZ L. JENNINGS, Justice

[fol. 96] APPENDIX

A.R.S. § 38-231 and § 38-233
As amended Laws 1961, Ch. 108, § 5 and § 6.

§ 38-231. Officers and employees required to take loyalty oath; form; penalty

A. In order to insure the statewide application of this section on a uniform basis, each board, commission, agency, and independent office of the state, and of any of its political subdivisions, and of any county, city, town, municipal corporation, school district, and public educational institution, shall immediately upon the effective date of this act completely reproduce § 38-231 as set forth herein, to the end that the form of written oath or affirmation required herein shall contain all of the provisions of said section for use by all officers and employees of all boards, commissions, agencies and independent offices.

B. For the purposes of this section, the term officer or employee means by person elected, appointed, or employed, either on a part-time or full-time basis, by the state, or any of its political subdivisions or any county, city, town, municipal corporation, school district, public educational institution, or any board, commission or agency of any of the foregoing.

C. Any officer or employee elected, appointed, or employed prior to the effective date of this act shall not later than ninety days after the effective date of this act take and subscribe the form of oath or affirmation set forth in this section.

D. Any officer or employee within the meaning of this section who fails to take and subscribe the oath or affirmation provided by this section within the time limits prescribed by this section shall not be entitled to any compensation unless and until such officer or employee does so take and subscribe to the form of oath or affirmation set forth in this section.

E. Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and knowingly or wilfully at the time of subscribing the oath or affirmation, or at any time thereafter during his term of office or employment does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions, or during such term of office or employment knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, [fol. 97] shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional compensation or any other enoluments or benefits which may have been incident or appurtenant to said office or employment.

F. Any of the persons referred to in Article XVIII, Section 10 of the Arizona Constitution as amended, re-

lated to the employment of aliens, shall be exempted from any compliance with the provisions of this section.

G. In addition to any other form of oath or affirmation specifically provided by law for an officer or employee, before any officer or employee enters upon the duties of his office or employment, he shall take and subscribe the following oath or affirmation:

State of Arizona, County of ———— I, ———
(type or print name)
———— do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of ————(name of office)———— according to the best of my ability, so help me God (or so I do affirm).

————————————
(signature of officer or employee

§ 38-233. Filing oaths of record

A. The official oaths of state elective officers shall be filed of record in the office of the secretary of state. The official oaths of all other state officers and employees shall be filed of record in the office of the employing state board, commission or agency.

B. The official oaths of notaries public and of elective county and elective precinct officers shall be filed or record in the office of the county recorder, except the oath of the recorder, which shall be filed with the clerk of the board of supervisors. The official oaths of all other county and precinct officers and employees shall be filed of record in the office of the employing county or precinct board, commission or agency.

C. The official oaths of all city, town or municipal corporation officers or employees shall be filed of record in the respective office of the employing board, commission or agency of the cities, towns and municipal corporations.

D. The official oaths of all officers and employees of all school districts shall be filed of record in the office of the superintendent of public instructions.

[fol. 98] E. The official oaths of all officers and employees of each public educational institution except school districts shall be filed of record in the respective offices of said public educational institutions.

F. The official oath or affirmation required to be filed of record shall be maintained as a permanent official record.

[fol. 99]

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

No. 7406

[Title Omitted]

MOTION FOR REHEARING—Submitted May 15, 1963

Come now the Appellants and move the Court for rehearing in the above-entitled matter for the reasons and upon the grounds hereinafter set forth.

I

For the purposes of this Motion for Rehearing, the Appellants reiterate each and every matter set forth in their opening brief heretofore filed in the above-entitled action.

II

It is respectfully submitted that the majority opinion of this Court, in its analysis of the statute in question and the case of *Killian* vs. *U.S.*, 368 U.S. 231, makes clear the most invidious force of the statute. If counsel understands the majority's opinion, the mere membership in any of the proscribed organizations might be so contaminating and so dangerous to the public employees that the legislative intent to forbid such membership to all public employees of the State becomes apparent. The instructions on membership approved in the decision on *Killian*

vs. *U.S.*, Supra, are predicated upon the subjective tests of membership, and the jury was instructed that it could find a party guilty from what in effect would be a group of isolated acts, if those isolated acts the jury believed showed a subjective intent to be a member. Thus the Legislature of the State of Arizona has put the burden upon any public employee that not only may he not be-[fol. 100] come a member of any proscribed organization but he may not in effect act in such a parallel way or have friends or acquaintances who, in connection with his parallel activities, might be affiliated with a proscribed organization; for if he does and if he does sign the oath, he places himself in jeopardy of the punishment set forth by the Legislature.

III

Appellants adopt the argument set forth in the opinion of Justice Bernstein: that the statute in question is un-Constitutional in that it does not afford a proper hearing procedure before the determination of whether or not in fact the public employee is subversive. In that regard, the United States Supreme Court decision, dismissing an appeal from the decision of the Supreme Court of the State of Washington, 361 P2d 551, is interesting. As set forth in the briefs of counsel at page 954, 7 Law Ed. U. S. Supreme Court Reports, and in particular the brief filed by the Attorney General and abstracted at page 950:

> "The procedure prescribed in the rules and regulations for the hearing before discharge of a professor is substantially the same as for an accused person in a court of law, except a jury trial. *Nostrand* v. *Little* (Wash)"

It would appear that the United States Supreme Court upheld the validity of the Washington case: *Nostrand* v. *Little*, 368 U.S. 436, 7 L Ed 2d 426, only on the basis that there was in fact a judicial procedure which gave the party substantially the same protections which a defendant in a criminal court proceeding would have, with all of the presumptions and right of counsel and other usual rights of a defendant as to procedural safeguards. Our

point of difference with Justice Bernstein would only be that this case came before the Court and was accepted by the Court as a class action; and the question of whether or not there is a hearing procedure for teachers is not [fol. 101] the sole answer to the attach on the Constitutionality of this statute. The appeal was drawn, briefed and argued on the right of every public employee, whether he be teacher or not. It would therefore seem that by the authority of the *Nostrand* v. *Little*, Supra, decision, the United States Supreme Court has ruled that statutes such as the Washington and Arizona statutes must provide for a fully constituted hearing for all public employees prior to the imposition of any penalty.

IV

Appellants further urge the Court to hold the legislation in question unConstitutional upon the grounds that the statute, by not providing a hearing with Constitutional safeguards and presumptions, is unConstitutional for the reasons that they constitute the taking of property without due process of law. In *Berry* vs. *Koehler*, 369 P 2d 1010, the Supreme Court of Iowa confirmed the great majority of cases ruling that a profession or occupation is such a property right as to be protected under the United States Constitutional provisions against the taking of property without due process of law. Certainly each public employee of the State, whether he be teacher or garbage collector, should not have his livelihood impaired without his "day in court" and the very effect of the prerequisite to payment being the oath taking, with the disclaimer and without the opportunity to explain his conduct, is such a taking of property without due process.

V

On the issue raised in Appellants' opening brief, on the vagueness of the statute involved, subsequent to the filing of said brief, the United States Supreme Court held a Florida statute unConstitutional on just those grounds. *Cramp* v. *Bd. of Public Instructions*, 368 U.S. 278, 7 Law Ed 2d 285.

[fol. 102] It is interesting to note that the United States Supreme Court did not feel that just because the public employee signed the oath with all of the provisions of the statute set out in front of him that this took away in any respect from the charge that the statute was vague and indefinite. The statute is set forth in its entirety in footnote #1 on page 287 of the Lawyers' Edition. Counsel might suggest that merely because a man can read something it does not necessarily mean that he can understand it.

Therefore, for all the reasons set forth in Appellants' Opening Brief and for those reasons reitered and set forth in this Motion for Rehearing, Appellants repectfully request a rehearing before this Court on the issues involved.

Respectfully submitted this 15th day of May, 1963.

W. EDWARD MORGAN
45 West Pennington, Suite 407
Tucson, Arizona
Attorney for Appellants

Copy received this day of May, 1963:

ATTORNEY GENERAL OF THE
STATE OF ARIZONA

By _____

Copy mailed May 16, 1963, to:
PIMA COUNTY ATTORNEY
Pima County Court House
Tucson, Arizona

[fol. 103]

SUPREME COURT
STATE OF ARIZONA
PHOENIX

May 28, 1963

No. 7406

BARBARA ELFBRANDT, for herself and others similarly situated, APPELLANTS

v.

IMOGENE R. RUSSELL, ET AL, APPELLEES

The following action was taken by the Supreme Court of the State of Arizona on May 28, 1963, in regard to the above-entitled cause:

"ORDER: Motion for Rehearing—DENIED."

SYLVIA HAWKINSON, Clerk
By /s/ L. Brooks
Assistant Clerk

To—W. EDWARD MORGAN
45 West Pennington, Suite 407
Tucson, Arizona
Attorney General
Capital Building
Phoenix, Arizona

County Attorney of Pima County
c/o Pima County Courthouse
Tucson, Arizona

[fol. 104]

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

[SEAL]

(Filed Jun. 4, 1963)

To the Honorable the Superior Court of the State of Arizona in and for the County of Pima

GREETING:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Pima, before you in a cause between

BARBARA ELFBRANDT, for herself
and others similary situated, PLAINTIFFS

vs.

IMOGENE R. RUSSELL, L. E. BOOL, and MARTHA L. ELLIOTT, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona; PAUL J. FANNIN, Governor of the State of Arizona; ROBERT W. PICKRELL, Attorney General of the State of Arizona; JEWEL W. JORDAN, State Auditor; LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELWOOD W. BRADFORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS, and LEON LEVY, members of the Board of Regents; and W. W. DICK, State Superintendent of Public Instruction, and PAUL J. FANNIN, Governor, ex-officio members of the Board of Regents; FLORENCE REECE, Pima County Superintendent of Schools; ROBERT D. MORROW, Superintendent of Tucson School District #1; JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WILLIAM J. PISTOR, School Board, Tucson District #1; and RICHARD A. HARVILL, President of the University of Arizona, DEFENDANTS

Case No. 68451:

said Superior Court entered its judgment on the 30th day of June, 1961, in favor of the defendants and against the plaintiffs.

[fol. 105] as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by plaintiffs agreeably to the law in such case made and provided fully and at large appears

And Whereas, in May, in the year of our Lord one thousand nine hundred and sixty-two, the said cause came on to be heard before said Supreme Court, and was submitted for decision after argument of counsel.

On Consideration Whereof, it was on the first day of May in the year of our Lord one thousand nine hundred and sixty-three, ordered by this Court that the judgment of the said Superior Court in this cause, appealed from be, and the same is hereby affirmed.

[fol. 106] You therefore are hereby commanded that such proceedings be had in said cause, as according to the decision and order of this Court, and as according to right and justice, and to law, out to be had.

Witness, the Honorable Charles C. Bernstein, Chief Justice of the Supreme Court of the State of Arizona, the Third day of June, in the year of our Lord one thousand nine hundred and sixty-three.

COSTS OF .....

Clerk	$.....
Reporter's Transcript....	$.....
Transcript of Record....	$.....
Abstract of Record.....	$.....
Brief	$.....
	$.....

/s/ Sylvia Hawkinson
Clerk of the Supreme Court
of the State of Arizona

No. 7406

SUPREME COURT
OF THE STATE OF ARIZONA

BARBARA ELFBRANDT, for herself and others similarly situated, APPELLANTS

vs.

IMOGENE R. RUSSELL, L. E. BOOL, and MARTHA L. ELLIOTT, etc. et al., APPELLEES

MANDATE

[fol. 107]

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 108]

SUPREME COURT OF THE UNITED STATES

ELFBRANDT ET AL. v. RUSSELL ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 553, Misc. Decided June 15, 1964.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Arizona for further consideration in light of *Baggett* v. *Bullitt*, No. 220, October Term, 1963, decided June 1, 1964.

[fol. 109]

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

Filed July 14, 1964, Sylvia Hawkinson, Clerk, Supreme Court

[SEAL]

To the Honorable the Judges of the Supreme Court of the State of Arizona,

GREETINGS:

WHEREAS, lately in the Supreme Court of the State of Arizona, there came before you a cause between Barbara Elfbrandt, for herself and others similarly situated, appellants, and Imogene R. Russell, L. E. Bool and Martha L. Elliott, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona; Paul J. Fannin, Governor of the State of Arizona; Robert W. Pickrell, Attorney General of the State of Arizona; Jewell W. Jordan, State Auditor; Lynn M. Laney, O. D. Miller, Samuel H. Morris, John G. Babbitt, Elwood W. Bradford, Vivian Layti Boysen, George W. Chambers, and Leon Levy, members of the Board of Regents; W. W. Dick, State Superintendent of Public Instruction, and Paul J. Fannin, Governor, ex-officio members of the Board of Regents; Florence Reece, Pima County Superintendent of Schools; Robert D. Morrow, Superintendent of Tucson School District #1; Jacob C. Fruchthendler. Delbert L. Secrist, Nan Lyons, Norval W. Jasper and William J. Pistor, School Board, Tucson District #1; Richard A. Harvill, President of the University of Arizona, appellees, No. 7406, wherein the judgment of the said Supreme Court was duly entered on the 1st day of May, A. D. 1963, as appears by an inspection of the record of the said Supreme Court which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of a writ of certiorari as provided by act of Congress.

AND WHEREAS, in the October Term, 1963, the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES on the said transcript of record:

[fol. 110] ON CONSIDERATION WHEREOF, it was ordered and adjudged on June 15, 1964, by this Court that the judgment of the said Supreme Court in this cause be reversed with costs, and that this cause be remanded to the Supreme Court of the State of Arizona for further consideration in light of Baggett v. Bullitt, No. 220, October Term, 1963, decided June 1, 1964.

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said writ of certiorari notwithstanding.

Witness the Honorable EARL WARREN, Chief Justice of the United States, the tenth —— day of July ——, in the year of our Lord one thousand nine hundred and sixty-four.

Costs:

Clerk's costs $100

/s/ John F. Davis
Clerk of the Supreme Court
of the United States

The above amount to be paid directly
to the Clerk of the Supreme Court of
the United States.

No. 553, Misc., October Term, 1963

Barbara Elfbrandt,

vs

Imogene R. Russell, et al.

[fol. 111]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

En Banc

[File Endorsement Ommitted]

No. 7406

BARBARA ELFBRANDT, for herself and others similarly situated, APPELLANTS

v.

IMOGENE R. RUSSELL, L. E. BOOL and MARTHA L. ELLIOTT, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona; PAUL J. FANNIN, Governor of the State of Arizona; ROBERT W. PICKRELL, Attorney General of the State of Arizona; JEWEL W. JORDAN, State Auditor; LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELDWOOD W. BRADFORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS, and LEON LEVY, members of the Board of Regents; W. W. DICK, State Superintendent of Public Instruction, and PAUL J. FANNIN, Governor, ex-officio members of the Board of Regents; FLORENCE REECE, Pime County Superintendent of Schools; ROBERT D. MORROW, Superintendent of Tucson School District #1; JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WILLIAM J. PISTOR, School Board, Tucson District #1; RICHARD A. HARVILL, President of The University of Arizona, APPELLEES

On Remand from the Supreme Court of the United States
Judgment Reinstated

W. Edward Morgan, Tucson,

Attorney for Appellants

Robert W. Pickrell, The Attorney General and
Philip M. Haggerty, Assistant Attorney General, Phoenix,

Attorneys for Appellees

S. Leonard Scheff, Tucson, and
Robert J. Hirsh, Tucson,

Attorneys for Amicus Curiae Arizona Civil Liberties Union

Amelia D. Lewis, Sun City, and
Jay Dushoff, Phoenix,

Attorneys for Amicus Curiae Arizona Civil Liberties Union (Northern Arizona Chapter)

OPINION—filed December 30, 1964

STRUCKMEYER, *Justice.*

[fol. 112] This case arises out of the refusal of Barbara Elfbrandt, a teacher in the public schools at Tucson, Arizona, to subscribe to the oath required by the Arizona Communist Control Act of 1961 of all public officers and employees. In our decision, Elfbrandt v. Russell, 94 Ariz. 1, 381 P.2d 554, May 1, 1963, we summarily disposed of the issue of the asserted vagueness in the Arizona act with the statement that it "does not have the unconstitutional vice of vagueness and indefiniteness in placing an accused on trial for an offense, the nature of which he is given no fair warning, for punishment is restricted to specified acts knowingly and wilfully committed." [1] The Supreme Court of the United States, by Per Curiam order dated June 15, 1964, vacated the judgment, and remanded the cause to this Court "for further considera-

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[1] 94 Ariz. 1, 8.

tion in light of Baggett v. Bullitt, No. 220, October Term 1963, decided June 1, 1964."

The Arizona oath,[2] with insignificant changes, has been used in the Territory and the State of Arizona for over one hundred years. An oath of allegience in part couched in nearly identical language is required by Congress of those seeking citizenship by naturalization.[3] Plainly, the [fol. 113] Arizona oath is no more than a restatement of the duties of citizenship, an express engagement to which all who are afforded the protective cloak of the Constitution and laws of this country and state are irrevocably bound.

The Washington oath [4] did not by its language confine the taker to the undertakings of citizenship and the faithful and impartial discharge of the duties of an office. It offended because it "is not open to one or a few interpretations, but to an indefinite number" and that only "extensive adjudications, under the impact of a variety

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[2] "State of Arizona, County of ———— I, ————————————do solemnly swear (or affirm) that
(type or print name)
I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of ———— (name of office) ———— according to the best of my ability, so help me God (or so I do affirm)." A.R.S. § 38-231, subs. G, as amended Laws 1961, Ch. 108, § 5.

[3] "(a) A person who has petitioned for naturalization shall, in order to be and before being admitted to citizenship, take in open court an oath (1) to support the Constitution of the United States; * * * (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; * * *." 66 Stat. 258, 8 U.S.C.A. § 1448.

[4] "I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." Wash. Laws 1931, c. 103, § 1.

of factual situations, would bring the oath within the bounds of permissible constitutional certainty." Baggett v. Bullitt, 377 U.S. 360, 378.

We recognize that the words "true faith and allegiance", "defend", and "faithfully and impartially" in the context in which they are used range high in the level of abstractions. But Arizona's general perjury statute, A.R.S. § 13-561, has no application for the act contains an [fol. 114] enumeration of the offenses punishable criminally as perjury, A.R.S. § 38-231, subs. E.[5] A statute which enumerates the subjects or things upon which it is to operate will be construed as excluding from its effect all those not especially mentioned. Lewis v. Industrial Commission, 93 Ariz. 324, 380 P.2d 782. No criminal act is committed under the specific language of the oath if the taker is unfaithful, partial, divides his allegiance or fails to defend the Constitution and laws against all enemies. The test is wholly subjective, binding only to the extent of the individual's conscience.

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[5] "Any officer or employee as defined in this section having taken the form of oath or affirmation prescribed by this section, and knowingly or wilfully at the time of subscribing the oath or affirmamation, or at any time thereafter during his term of office or employment, does commit or aid in the commission of any act to overthrow by force or violence the government of this state or of any of its political subdivisions, or advocates the overthrow by force or violence of the government of this state or of any of its political subdivisions or during such term of office or employment knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions, and said officer or employee as defined in this section prior to becoming or remaining a member of such organization or organizations had knowledge of said unlawful purpose of said organization or organizations, shall be guilty of a felony and upon conviction thereof shall be subject to all the penalties for perjury; in addition, upon conviction under this section, the officer or employee shall be deemed discharged from said office or employment and shall not be entitled to any additional compensation or any other emoluments or benefits which may have been incident or appurtenant to said office or employment." A.R.S. § 38-231, subs. E, as amended Laws 1961, Ch. 108, § 5.

By A.R.S. § 38-231, subs. G public officers and employees who take the oath promise, under penalty of perjury, that they are not knowingly or wilfully engaged in and will not in the future during their terms of office [fol. 115] knowingly or wilfully engage in the conduct specified in A.R.S. § 38-231, subs. E:

> 1. Commit any act to overthrow by force or violence the government of this state or any of its political subdivisions;
>
> 2. Aid in the commission of any act to overthrow by force or violence the government of this state or any of its political subdivisions;
>
> 3. Advocate the overthrow by force or violence of the government of this state or any of its political subdivisions;
>
> 4. Become knowingly and wilfully a member of the Communist Party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the State of Arizona or any of its political subdivisions and prior to becoming a member of such organization, or organizations, had knowledge of the unlawful purpose of the organization, or organizations;
>
> 5. Remain knowingly and wilfully a member of the Communist Party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the State of Arizona or any of its political subdivisions and prior to becoming a member of such organization, or organizations, had knowledge of the unlawful purpose of the organization, or organizations.

The commission of any of these acts at the time of taking the oath or thereafter by a public officer or employee is declared to be a felony punishable in the same manner as perjury. Were we to consider, which we do not, any part of A.R.S. § 38-231, subs. E unconstitutional, the

oath provided by § 38-231, subs. G would not fall for the act provides that if any provision is held invalid, the invalidity shall not affect other provisions which can be given effect.

If we correctly understand the opinion of the Supreme Court of the United States in *Baggett*, it is the sus- [fol. 116] ceptibility of a statute to the interpretation of required forswearing of an undefinable variety of "guiltless knowing behavior" which is condemned, Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285. In this we think there is a vital distinction between the Washington act [6] and the Arizona act. Arizona does not seek to punish one who advises, teaches or abets or advocates by any means any person to commit or aid in the commission of any act intended to overthrow or alter, or to assist in the overthrow or alteration, of the constitutional form of government by revolution, force or violence. Arizona punishes those who commit or aid in the commission of an act to overthrow the government by force or violence. The act cannot be innocently committed or aided for the legislature has provided that it must be done "knowingly or wilfully"; that is, that it be voluntary and purposeful and not because of a mistake, inadvertence or for any innocent reason or that the act be done with an evil motive to accomplish that which the statute condemns.

By A.R.S. § 13-131, in every crime or public offense [fol. 117] there must exist a union or joint operation of

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[6] Washington required public employees to swear they were not a subversive person as defined by statute:

" 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization." Rev. Code Wash. § 9.81.010 (5).

act and intent or criminal negligence. But the crime of committing or aiding in the commission of an act to overthrow the government of the state or any of its political subdivisions cannot be completed if accompanied only by a generalized intent to commit an act. The language of subs. E, A.R.S. § 38-231, requires that it be read as committing or aiding in the commission of an act *in an attempt* to overthrow the government or any of its political subdivisions. The overt act or the aiding therein must be with actual intent to accomplish the result forbidden, State v. Mandel, 78 Ariz. 226, 278 P.2d 413, and a specific intent to overthrow must exist. It must be an intent in fact which cannot be implied or presumed and must be proved by evidence or facts other than those establishing the overt act. Cf. People v. Snyder, 15 Cal. 2d 706, 104 P.2d 639.

Moreover, the act must be such as will apparently result in the usual and natural course of events, if not hindered by extraneous causes, in the overthrow of the government by force and violence. Preparation alone is not enough; there must be some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstance independent of the will of the attempter, State v. Mandel, supra. Cf. People v. Camodeca, 52 Cal.2d 142, 338 P.2d 903.

In this state there is no distinction between accessories before the fact and principals. A.R.S. § 13-138. All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid or abet in its commission or, not being present, have [fol. 118] advised and encouraged in its commission, are principals. A.R.S. § 13-139. We have construed the aiding required by this statute as some positive act of physical or moral force joining with that of the perpetrator of the crime and producing the result. State v. Martin, 74 Ariz. 145, 245 P.2d 411. The aiding, made punishable by subs. E, is the same as that which would make an accessory before the fact a principal under § 13-139; that is, if the aider is present he must have assisted in commission of the overt act or, if not being present, have

advised *and* encouraged its commission. In a crime where a specific intent is an element there can be no innocent aiding. Acker v. State, 26 Ariz. 372, 226 Pac. 199.

Since both the act and the aiding referred to in the statute must be in attempts with the specific intent to overthrow the government, the Arizona statute § 38-231, subs. E is not afflicted with the many uncertainties in advising, teaching or assocations found potentially punishable in Baggett v. Bullitt, supra. Nor does it reach endorsements or support for Communist candidates for office nor a lawyer who represents the Communist Party, or its members, nor journalists who defend the Communist Party, its rights, or its members. Such conduct is neither an act nor in aid of an act attempting to overthrow the government by force and violence.

It is our conclusion that the portions of the Arizona act here considered do not forbid or require conduct in [fol. 119] terms so vague that men of common intelligence must necessarily guess at the meaning and differ as to their application.

The judgment of the superior court is ordered reinstated.

FRED C. STRUCKMEYER, JR., *Justice*

CONCURRING:

JESSE A. UDALL, *Chief Justice*

LORNA E. LOCKWOOD, *Vice Chief Justice*

EDWARD W. SCRUGGS, *Justice*

[fol. 120]

BERNSTEIN, *Justice* (Dissenting)

In my concurring opinion in the original decision in this case I stated that the statute would be constitional only if it provided for a hearing which complied with the requirements of procedural due process and at which the State had the burden of proving the disloyalty of those excluded from public employment. My analysis of Baggett v. Bullitt, 377 U.S. 360 now convinces me that such a hearing could not save the constitutionality of the Arizona statute.

The majority ignores the troublesome clauses of A.R.S. § 38-231 E. These are the provisions of the Act which prohibit one from becoming or remaining a member of certain organizations. One of its provisions prohibits membership in ". . . any other organization having for *one* of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions . . ." (Emphasis supplied) Let us consider a scientist, a teacher in one of our universities. He could not know whether membership is prohibited in an international scientific organization which includes members from neutralist nations and Communist bloc nations—the latter admittedly dedicated to the overthrow of our government and which control the organization—even though access to the scientific information of the organization is available only to its members.

> "It is subversive activity, for example, to attend and participate in international conventions of mathematicians and exchange views with scholars from Communist countries?" Baggett v. Bullitt, 377 U.S. at 369.

Though all might agree that the principal purpose of such an organization is scientific, the statute makes his membership a crime if any subordinate purpose is the overthrow of the state government. The vice of vague-[fol. 121] ness here is that the scientist cannot know whether membership in the organization will result in prosecution for a violation of § 38-231 E or in honors

from his university for the encyclopedic knowledge acquired in his field in part through his membership.

> "It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted for knowing but guiltless behavior nevertheless remains. 'It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches us that prosecutors too are human.'" Baggett v. Bullitt, 377 U.S. at 373.

In such a case even approval of his membership in the organization by the United States State Department could not assure him that he would not be prosecuted, as this is a state criminal statute.

> "Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe." Baggett v. Bullitt, 377 U.S. at 372.

Free association may not be so inhibited.

In view of the direction of the United States Supreme Court that we reconsider this case in the light of what was said in Baggett, I do not discuss the violence done by this statute in hampering the right of free association guaranteed by the First Amendment.

I respectfully dissent.

CHARLES C. BERNSTEIN, *Justice*

[fol. 122]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

Received, February 1, 1965, Clerk, Supreme Court

Filed, Feb. 1, 1965, Sylvia Hawkinson, Clerk, Supreme Court

Feb. 1, 1965 PM, Attorney General, State of Arizona

No. 7406

BARBARA ELFBRANDT, for herself and others similarly situated, APPELLANTS

vs.

IMOGENE R. RUSSELL, ET AL., APPELLEES

MOTION FOR REHEARING

COME NOW the Appellants and move the Court for rehearing in the above-entitled matter for the reasons and upon the grounds hereinafter set forth.

IT IS RESPECTFULLY SUBMITTED that the Court should rehear the above case for the following reasons:

If counsel understands the ruling of the majority of the Court in its recent opinion in this case, the Court is in effect legislating by rewriting Subsection (e) of the Statute. Counsel interprets the decision to mean that it is rewriting Subsection (e) to provide by judicial fiat that in addition to advocating the "overthrow by force or violence of the government of the State of Arizona or any of its political subdivisions," the advocacy must be joined by an overt act or the aiding in an overt act with the actual intent to accomplish the forbidden result with specific intent to overthrow, and that the proof of the specific intent must be shown by other overt acts.

One could then rewrite Section 3 by saying, in legislative terms, that a person who knowingly advocates the

overthrow by force or violence of the government of the State, with the specific intent to overthrow the government by force or violence, and engages in an overt act or acts with the actual intent to accomplish the forceful overthrow, or who aids in the commission of an overt act to overcome the government by force or violence, with [fol. 123] the actual intent to overthrow the government by force or violence, is guilty of a violation of the Statute and has committed an act of perjury under the terms of the Statute.

This judicial conclusion may on its face afford a constitutional predicate for the statute, and assuming for the moment that it does: (1) Does it solve the dilemma given rise by this type of legislation; and (2) does the Court have the authority to rewrite legislation; and (3) if it does have the authority, it is wise for the Court to engage in this rewriting of legislation?

ONE: Does the Court's decision solve the evil of the legislation.

It is respectfully submitted that by the fact of the split decision of this Court and the very fact that the United States Supreme Court granted certiorari in this case and referred the matter back for review, indicates that the statute is so vague that men of decent intelligence and fair heart cannot guide their conduct so as to be able to fully engage in their activities of freedom of speech and association without fear of prosecution under this statute.

A discerning law review on this matter is written in *Law in Transition* Quarterly, Vol. 1, FALL 1964, No. 4, "Arval A. Morris, *Baggett* v. *Bullitt*: Scienter & 'Guiltless Knowing Behavior'."

TWO: There are enough historical precedents and it is a general rule of constitutional law that the Court should attempt by all reasonable means to give legislation such a construction as would let its application in the particular case be constitutional.

A survey of these cases in the field of loyalty oaths indicates that as far as the courts will go is to add the quality of scienter when it is not explicit, but it would [fol. 124] appear to add restrictive conditions and the

detail and profusion which this Court's decision makes to the existing statute is far beyond the rule of reasonable construction and becomes in effect judicial legislation which is barred by the constitution of the State of Arizona in the division of authorities between the legislature, the executive and the judicial branches of government.

THREE: Assuming that the Court has the power and jurisdiction to do so, is it wise.

The object of the Court in its majority decision must be understood as an attempt to clarify the statute so that men of good will can understand the legislation and go about their normal affiairs of life with a precise instruction as to what of their conduct is legal and what of their conduct is illegal. Counsel suggests that the decision only makes the person more wary and more in need of legal advice than before.

If this were in the field of tax legislation where there is a long history of business experience to deal with economic matter, the habit of most people is to hire experts and accountants to advise them, then the complicated methodology of analysis undertaken by the majority decision might be acceptable; but this legislation deals with freedom of speech and freedom of assembly, it is criminal in its nature, and it is the legislation itself which must speak to the people in terms which are clear. It is the legislative vagueness that must be corrected. This Court would appear by its majority decision to expect laymen and their legal advisors to have more confidence in the super-restraint of courts in connection with the *stare decisis* than most lawyers today would believe reasonable. It means that if a person is an employee in this state engaged in the simple conduct of, in the express words of Subsection 3, advocating "the overthrow by force or violence of the government of this state or any of its [fol. 125] political subdivisions," and that is all he does, the sole reliance is that a future Court of this state will not modify this present court's interpretation of the statute and sustain a confiction for perjury.

It is the opinion of counsel that this is an unreasonable burden to place upon lawyers advising clients and upon laymen reading the statute, and more particularly regard-

ing the "square words" of the statute as incorporated in the oath that they sign.

It is suggested by counsel that the reasonable approach is to declare this legislation unconstitutional even within the terms of the majority decision and refer it back to the legislature and let the legislature redraft the legislation in light of the criteria laid down in the majority's decision. Then if the laymen can rely on the legislation, there is no chance of judicial decision to disrupt his reliance.

Therefore, Appellants respectfully request a rehearing before this Court on the issues involved.

RESPECTFULLY SUBMITTED this 28th day of January, 1965.

/s/ W. Edward Morgan
45 West Pennington Street
Tucson, Arizona
Attorney for Appellants

Copy mailed January 28, 1965, to:

DARRELL F. SMITH
The Attorney General
Capitol Bldg.
Phoenix, Arizona
Attorney for Appellees, &

PIMA COUNTY ATTORNEY
Pima County Courthouse
Tucson, Arizona

[fol. 126] SUPREME COURT

STATE OF ARIZONA
Phoenix

February 18, 1965

No. 7406

BARBARA ELFBRANDT, for herself and others similarly situated, APPELLANTS

v.

IMOGENE R. RUSSELL, ET AL., APPELLEES

The following action was taken by the Supreme Court of the State of Arizona on February 17, 1965, in regard to the above-entitled cause:

"ORDER: Motion for Rehearing—DENIED.
Justice Bernstein voted to grant.
Justice McFarland did not participate."

SYLVIA HAWKINSON, Clerk

By .....
Assistant Clerk

To—W. Edward Morgan
45 W. Pennington
Tucson, Arizona

Darrell F. Smith, Attorney General
Phoenix, Arizona

Attention: Philip Haggerty
Asst. Attorney General

Norman E. Green, County Attorney
Lawrence Ollason, Special Deputy County Attorney
% Pima County Courthouse
Tucson, Arizona

[fol. 127]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

To the Honorable the Superior Court of the State of Arizona in and for the County of Pima

GREETING:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Pima, before you in a cause between BARBARA ELFBRANDT, for herself and others similarly situated, Plaintiffs, v. IMOGENE R. RUSSELL, L. E. BOOL, and MARTHA L. ELLIOTT, members of the Board of Trustees of Amphitheater Elementary School District No. 10, Pima County, State of Arizona; PAUL J. FANNIN, Governor of the State of Arizona; ROBERT W. PICKRELL, Attorney General of the State of Arizona; JEWEL W. JORDAN, State Auditor; LYNN M. LANEY, O. D. MILLER, SAMUEL H. MORRIS, JOHN G. BABBITT, ELWOOD W. BRADFORD, VIVIAN LAYTI BOYSEN, GEORGE W. CHAMBERS, and LEON LEVY, members of the Board of Regents; and W. W. DICK, State Superintendent of Public Instruction, and PAUL J. FANNIN, Governor, ex-officio members of the Board of Regents; FLORENCE REECE, Pima County Superintendent of Schools; ROBERT D. MORROW, Superintendent of Tucson School District #1; JACOB C. FRUCHTHENDLER, DELBERT L. SECRIST, NAN LYONS, NORVAL W. JASPER and WILLIM J. PISTOR, School Board, Tucson District #1; and RICHARD A. HARVILL, President of the University of Arizona, Defendants. Case No. 68451: said Superior Court entered its judgment on the 30th day of June, 1961, in favor of the defendants and against the plaintiffs [fol. 128] as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by plaintiffs agreeably to the law in such case made and provided fully and at large appears.

WHEREAS, on the first day of May, 1963, it was ordered by this Court that the judgment of said Superior Court be affirmed.

AND WHEREAS, thereafter on the fifteenth day of June, 1964, the Supreme Court of the United States vacated the judgment and remanded the cause to this Court for further consideration.

[fol. 129] And Whereas, in September, in the year of our Lord one thousand nine hundred and sixty-four, the said cause came on to be heard before the said Supreme Court, and was submitted for decision after argument of counsel. On Consideration Whereof, it was on the thirtieth day of December in the year of our Lord one thousand nine hundred and sixty-four, ordered by this Court that the judgment of the said Superior Court in this cause, appealed from be, and the same is hereby ordered reinstated.

[fol. 130] You therefore are hereby commanded that such proceedings be had in said cause, as according to the decision and order of this Court, and as according to right and justice, and to law, ought to be had.

Witness, the Honorable Lorna E. Lockwood, Chief Justice of the Supreme Court of the State of Arizona, the twenty-third day of February, in the year of our Lord one thousand nine hundred and sixty-five.

Costs of .....

Clerk	$.....
Reporter's Transcript..	$.....
Transcript of Record..	$.....
Abstract of Record.....	$.....
Brief	$.....
	$.....

Sylvia Hawkinson
Clerk of the Supreme Court
of the State of Arizona

No. 7406

SUPREME COURT OF THE STATE OF ARIZONA

BARBARA ELFBRANDT, for herself and others similarly situated, APPELLANTS

vs.

IMOGENE R. RUSSELL, L. E. BOOL, and MARTHA L. ELLIOTT, etc., et al., APPELLEES

COPY OF MANDATE

Issued February 23, 1965.

[fol. 131]

SUPREME COURT OF THE UNITED STATES

No. 168 Misc., October Term, 1965

BARBARA ELFBRANDT, PETITIONER

v.

IMOGENE R. RUSSELL, ET AL.

On Petition for Writ of Certiorari to the Supreme Court of the State of Arizona.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ALLOWING CERTIORARI—October 11, 1965

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 656.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 794633 357