

# Supreme Court of the United States

October  
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Supreme Court, U. S.  
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In the Matter of:

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SARA BAIRD,

Petitioner,

vs

STATE BAR OF ARIZONA,

Respondent.

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Docket No. ~~55~~

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Date December 8, 1969

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ORAL ARGUMENT OF:

P A G E

Peter D. Baird, Esq.  
on behalf of Petitioner . . . . . 2

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IN THE SUPREME COURT FOR THE UNITED STATES

October

TERM 1969

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SARA BAIRD,

Petitioner

vs

STATE BAR OF ARIZONA,

Respondent

No. 53

Washington, D. C.  
December 8, 1969

The above-entitled matter came on for hearing at  
1:58 o'clock p.m.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

PETER D. BAIRD, ESQ.  
114 West Adams Street  
Phoenix, Arizona  
Counsel for Petitioner

MARK WILMER, ESQ.  
400 Security Building  
Phoenix, Arizona 85004  
Counsel for Respondent

P R O C E E D I N G S

1  
2 MR. CHIEF JUSTICE BURGER: Number 53, Baird against  
3 Arizona.

4 Mr. Baird.

5 ORAL ARGUMENT BY PETER D. BAIRD, ESQ.

6 ON BEHALF OF PETITIONER

7 MR. BAIRD: Mr. Chief Justice, and may it please  
8 the Court: My name is Peter Baird and I represent the  
9 Petitioner in this cause.

10 The case before is on writ of certiorari to the  
11 Arizona Supreme Court, and it concerns refusal to admit  
12 Petitioner to the practice of law in Arizona. She has graduated  
13 from Stanford Law School; she has passed the bar examination,  
14 and the refusal stands upon her refusal to completely fill out  
15 a questionnaire and affidavit prescribed by the Arizona Rules  
16 of the Supreme Court of Arizona.

17 There are two particular questions that are involved  
18 in this case. First is the question she did answer, and this  
19 was Question 25 and we set it forth on Page 3 of our brief.  
20 This is, and I quote: "List all organizations, associations  
21 and clubs other than Bar associations of which you are or have  
22 been a member since attaining the age of 16 years." This  
23 Petitioner did. She listed each and every organization to which  
24 she has belonged.

25 MR. JUSTICE STEWART: I looked through that brief

1 and then I looked in the appendix and I found that the form or  
2 the questionnaire was there, but I didn't see the answers that  
3 she gave to that question, or indeed, any other questions that  
4 she did answer.

5 MR. BAIRD: Mr. Justice Stewart, we do not have as  
6 part of the record, the answers to the questions. That is part  
7 of the committee's files and they were not introduced, so far  
8 as I know, before the Arizona Supreme Court.

9 MR. JUSTICE STEWART: And how do we then know, so  
10 far as the record goes, that she did fully answer Question 25?

11 MR. BAIRD: We allege that in our verified petition  
12 before the Arizona Supreme Court and so far as I know this was  
13 not denied, and the refusal to admit Petitioner is expressly  
14 based by the committee upon her refusal to answer Question 27;  
15 not Question 25.

16 MR. JUSTICE STEWART: There is something that just  
17 occurs to me, and maybe I'm quite wrong, and in the course of  
18 your argument maybe you will persuade me so, but that the  
19 validity of the refusal to answer Question 27 might depend upon  
20 what answer was given to Question 25 and we don't know what  
21 answer was given to Question 25.

22 MR. BAIRD: That is true. As part of the record  
23 you do not know the names of the organizations to which she has  
24 belonged, which she did list.

25 MR. JUSTICE STEWART: Well, I don't want to throw

1 you off.

2 MR. BAIRD: Her -- Question 27 reads: "Are you  
3 now or have you ever been a member of the Communist Party or  
4 any organization that advocates overthrow of the United States  
5 Government by force or violence?"

6 MR. CHIEF JUSTICE BURGER: Would you say that is  
7 one question or more than one question?

8 MR. BAIRD: I would say, Mr. Chief Justice, that it  
9 really is two questions, one which overlaps with the first  
10 question, which she answered. In other words, the reference  
11 to the Communist Party would show up in a question which she  
12 did answer; if she had belonged to the Communist Party it would  
13 have showed up in response to Question 25 and there is no con-  
14 tention, I might add, parenthetically, that any of those really  
15 is the Communist Party.

16 So, the essence of her refusal goes to the require-  
17 ment that she characterized the groups she belonged to and  
18 listed in response to 25 as to whether they do advocate over-  
19 throw of the government.

20 MR. CHIEF JUSTICE BURGER: Your brief, as I followed  
21 your arguments in the brief, places particular emphasis on the  
22 invasion of the Petitioner's right of free political association  
23 but may I ask you this question: do you include the second  
24 half of that question, that is the question addressed to whether  
25 there is membership in any organization advocating the overthrow

1 by the government, as an invasion of politically and constitu-  
2 tionally protected right to list the associations?

3 MR. BAIRD: Yes, we do.

4 MR. CHIEF JUSTICE BURGER: That means that you  
5 contend that there is a constitutional right, guaranteed and  
6 protected right to overthrow the government by force and  
7 violence?

8 MR. BAIRD: That is not correct, Mr. Chief Justice.

9 MR. CHIEF JUSTICE BURGER: Doesn't that follow?

10 MR. BAIRD: No; I do not believe it does.

11 MR. CHIEF JUSTICE BURGER: Well, I hope sometime  
12 while you are on your feet you will explain that to me.

13 MR. BAIRD: I shall do it right now, as a matter of  
14 fact.

15 The question as to forcing her to characterize  
16 whether any of the groups that she has belonged to advocates  
17 the overthrow of the Government of the United States by force  
18 and violence requires her to state whether, under the Smith  
19 Act, as I understand it, any of them actually does advocate the  
20 overthrow of the Government.

21 Now, the burden upon Petitioner is significant in  
22 that respect. It requires her to make various value judgments  
23 under the Smith Act, and therefore would make her less likely  
24 to join these organizations. As to whether membership per se  
25 in this kind of an organization is unprotected conduct, I think

1 that under the decisions in Elfbrandt, and perhaps in Robel,  
2 that one must actually have a specific intent to overthrow the  
3 government; be an active member, know that the organization  
4 advocates the overthrow of the government and share that purpose  
5 before that association or status may be proscribed.

6 The most significant aspect of Question 27, apart  
7 from the freedom of association aspect, is the purpose for which  
8 Question 27 is asked, and this is extremely important in the  
9 freedom of association area where the burden is not upon the  
10 applicant to state why she shouldn't have to answer it; the  
11 burden is shifted to the state to come forth with a compelling  
12 state interest to say why she should answer it.

13 The compelling state interest, which the state has  
14 come forward with in this case, and presented to the Arizona  
15 Supreme Court, is, and I quote as follows:

16 "Once we are to conclude that one who truly and  
17 sincerely believes in the overthrow of the United States Govern-  
18 ment by force and violence is also qualified to practice laws  
19 in our Arizona courts, then an answer to this question is,  
20 indeed, appropriate."

21 The committee again emphasizes that a mere answer  
22 of "yes," would not lead to an automatic rejection of the  
23 application. It would lead to an investigation and interroga-  
24 tion as to whether the applicant presently entertains the view  
25 that the violent overthrow of the government is something to be



1 sought after. If the answer to this inquiry was "yes," then  
2 indeed we would reject the application and recommend against  
3 submission.

4 MR. CHIEF JUSTICE BURGER: Would you think that  
5 this question would similarly inappropriate to ask a candidate,  
6 an applicant for a job as a police officer?

7 MR. BAIRD: If the purpose were to seek not the  
8 conduct of the police officer but rather his political beliefs  
9 and views, I would say that it would be inappropriate. This  
10 Court has almost an unbroken chain of precedents saying that  
11 belief is absolute, Mr. Chief Justice. And I would submit  
12 that in any situations except those involving absolute discretion  
13 with the appointment of a public service, that beliefs or brain  
14 waves of an individual are not the concern or the business of  
15 the state.

16 It seems to us that the case really is controlled  
17 by Speiser versus Randall. In that case, where a tax exemption  
18 was dependent upon the execution of an affidavit stating that  
19 the Applicant did not advocate the overthrow of the government  
20 this court inferred in holding that that denial of the tax  
21 exemption was unconstitutional; that there was a frank aim at  
22 suppressing dangerous ideas, and therefore it was unconstitu-  
23 tional.

24 We say that our case is even stronger. The right  
25 to practice law, which has been described by this court as far

1 back as 1867 as a right, is much more precious than a tax  
2 exemption. In our case we need not infer an assault upon  
3 political belief. It is frankly out in front of us by the  
4 expressed statement and very candid admission of the committee.

5 The effect upon holding that belief is a valid  
6 subject of inquiry for the State Bar or for any other govern-  
7 ment institution, it seems to me to involve a tremendous amount  
8 of deterrence, of thought control, of perjury problems if the  
9 person is under oath, as to how to know whether an individual  
10 is telling the truth with respect to matters of the mind.

11 I guess one of our basic points in this area was  
12 made in 1867 in ex parte Garland where a former member of the  
13 Confederate cause sought to be a lawyer, and was barred because  
14 he could not take the oath of office required of him. This  
15 Court, in holding that to be a bill of attainder, said that the  
16 right to practice law can only be deprived of by misconduct,  
17 consisting of moral or professional delinquency. This point  
18 was also referred to in Schwere versus the Board of <sup>Bar</sup> Examiners,  
19 where it was noticed that it would be important that the  
20 Petitioner there actually participated in some unlawful conduct.

21 We believe that disbarment in the criminal law  
22 sanctions are sufficient to prevent the sort of threat which is  
23 posed by one's mind. In function, this Question 27 is really a  
24 test oath, because it is not a conduct; it is not asked for the  
25 pose of finding out whether an individual engaged in unlawful

1 conduct; it is asked for the express purpose of finding out  
2 whether one has an intent which is to overthrow the government  
3 of the United States.

4 MR. JUSTICE STEWART: As I understand it, Mr.  
5 Baird, it is your submission that it is no business at all of  
6 government, either in hiring of employees or in qualifying  
7 applicants for -- to follow various professions, it is absolutely  
8 no business of government to ask any questions at any time to  
9 such applicants, as to those applicants' beliefs.

10 MR. BAIRD: As to political beliefs and religious  
11 beliefs, in particular, Mr. Justice Stewart.

12 MR. JUSTICE STEWART: Well, now, you're narrowing it  
13 a bit now, I think.

14 MR. BAIRD: Well, insofar as -- I can see that you  
15 might say that a bar examination is to test one's thought  
16 processes of some sort, because it goes to competency. I don't  
17 believe that --

18 MR. JUSTICE STEWART: Well, apart from any technical,  
19 professional competency, let's take the police officer and let's  
20 say he's the requisite weight and height and he has the educa-  
21 tional qualifications, but then they -- it comes to their  
22 attention that he believes that all Negroes are inferior and that  
23 they are all criminals and that there should be absolute segrega-  
24 tion in the races -- between the races in the city in which he  
25 applying to act as a police officer. Do you think that's

1 relevant at all to his ability to act as a police officer  
2 representing the public.

3 MR. BAIRD: I think it may be relevant, but I don't  
4 believe that relevancy in this situation can be the subject  
5 -- can be the substitute for a constitutional ban which I  
6 understand under the holdings of this court if belief is  
7 absolute as it was said in Cantwell versus Connecticut. If  
8 views of the individual are inviolate, I submit that it cannot  
9 be inviolate in some instances or absolute in other instances.

10 Take the situation of the lawyer where he believes  
11 very strong in opposing the equal protection clause of the  
12 United States Constitution. He opposes Brown versus Board of  
13 Education; he has a state of mind which is inconsistent with the  
14 following of the mandate of this court and of the constitution.  
15 One could say that is relevant because it may be transposed  
16 into conduct which would obstruct equality --

17 MR. JUSTICE STEWART: Well, that has to do with his  
18 belief as to what the equal protection clause of the 14th  
19 Amendment means. But, let's assume that he's very strongly of  
20 the belief that the way to solve human problems, controversies  
21 between human beings or between an individual and the state, is  
22 not by law, but is by throwing bombs. Do you think he ought to  
23 be admitted to be a lawyer in the state? If all his beliefs  
24 are the law is absolutely a useless mechanism to solve any  
25 problems and that the way to do it is by assassination and

1 bombs and machine guns.

2 MR. BAIRD: So far as that is a thought process and  
3 does not approach action then I would say yes, that is protec-  
4 ted, just the same as a belief of fighting wars without  
5 Congressional declaration. I think there are all sorts of  
6 thoughts which are inconsistent which are transposed into  
7 conduct, which pose enormous threats to the security of the  
8 United States, but the converse, the choice is opening a wedge  
9 into a freedom of a man's mind.

10 MR. JUSTICE STEWART: Well, we're not here talking  
11 about whether or not such a belief might be protected in the  
12 abstract, in which I would suppose everybody would agree  
13 with you. But the question is about whether such a person is  
14 the kind of a person who would have the proper ingredients to  
15 be a lawyer and can a state which does set up standards for  
16 admission to its bar, relevantly make such an inquiry?

17 MR. BAIRD: Not into his mind; into his background,  
18 his conduct; his character, but not into his mind, Mr. Justice  
19 Stewart; because you could ask that sort of a question in any  
20 sort of a context with respect to any kind of belief which  
21 means some bar committee must have some value judgment in mind.  
22 as to what is good belief and what is bad belief and as I under-  
23 stand the Flag Salute case, in West Virginia versus Barnette,  
24 this Court said that no official, high or petty, has the right  
25 to prescribe what is orthodox politics, religion or matters of

1 the conscience. And a man's mind really is a very, very  
2 highly protected right, in the abstract or in the concrete;  
3 either way. And it is our contention that this part of the  
4 question which is aimed at belief can be sharply contrasted  
5 from the oath which Petitioner is seeking to take, the oath  
6 of office, which is sanctioned in Arizona by the rules of this  
7 Court and by the Constitution, to support the laws of the  
8 United States, and she is willing to do this and that is an  
9 oath which is not broken by thought; it is an oath which is  
10 broken by conduct; by unlawful conduct.

11 MR. JUSTICE WHITE: I take it you say that not only  
12 may they not only pry into the mind, but that the Petitioner  
13 is constitutionally entitled, not only to believe without being  
14 barred from admission to the bar, but also to join an organiza-  
15 tion with others who have similar beliefs, in the first place,  
16 and secondly, to join an organization of others who have not  
17 only similar beliefs, but the organization as an entity,  
18 actively pursues the overthrow of government by force and  
19 violence. The Petitioner is constitutionally entitled to join  
20 that organization and still be a member of the bar and until  
21 and less proved that by conduct he joins the activities of the  
22 organization; he joins in the activities of the organization.

23 MR. BAIRD: Mr. Justice White, I first of all say  
24 that isn't the case here, but I do wish to meet your point,  
25 which is: when you move from the area of belief, the continuing

1 into conduct, and the closer you come to conduct the more  
2 likely I am to say that the Bar Committee has every right to  
3 examine that conduct and to make its determination as to whether  
4 it indicates moral turpitude, or bad moral character.

5 I would say that if an individual belongs to the  
6 Community Party or some very unpopular organization such as  
7 that, or taken on the right side of the spectrum, the Minutemen,  
8 or whatever, that that person, until he actually violates the  
9 law by his conduct, I do not believe that he should be denied  
10 the right to practice law.

11 MR. JUSTICE WHITE: Well, let's assume that there  
12 is some point at which his affiliation with the organization  
13 is qualified. May the state, as a preliminary matter, ask him  
14 if he is a member of the organization?

15 MR. BAIRD: In our case, I say yes. We have  
16 answered every organization --

17 MR. JUSTICE WHITE: You would say that they may say  
18 to a person, "Are you a member of the Communist Party?"

19 MR. BAIRD: Yes.

20 MR. JUSTICE WHITE: And disqualify him if he  
21 refuses to answer.

22 MR. BAIRD: Well, I think that probably is closer  
23 to the fact of the case which will follow this one, than ours.  
24 and I would say that insofar as Konigsberg and Anastaplo state  
25 the law, that Petitioner in this case, as she did, must answer

1 a question asking for the name of an organization.

2 MR. JUSTICE WHITE: It is a different question  
3 whether they can disqualify her if she is a member. I under-  
4 stand that. You think it's a different question, too.

5 MR. BAIRD: You mean if she's already a lawyer?

6 MR. JUSTICE WHITE: No. If she answers "yes," it's  
7 a different question whether she can be disqualified from  
8 practice.

9 MR. BAIRD: If I follow you right, yes.

10 MR. JUSTICE BLACK: Where is her answer to 25?  
11 Is it in the record anywhere?

12 MR. BAIRD: I do not believe it is, Mr. Justice  
13 Black. I don't think that the committee entered that into  
14 evidence before the Arizona Supreme Court, so it's not --

15 MR. JUSTICE BLACK: You mean they didn't put in her  
16 answer to Question 25?

17 MR. BAIRD: I do not think so. I do not recall  
18 that that is actually part of the record. All I know is that  
19 we allege that she fully and fairly answered the question and  
20 there has been no --

21 MR. JUSTICE BLACK: Did they say to answer 25?

22 MR. BAIRD: Yes.

23 MR. JUSTICE BLACK: She has been accused of not  
24 answering 25?

25 MR. BAIRD: No; she has not been accused of not



1 answering Question 25.

2 MR. JUSTICE BLACK: And that asks for all the  
3 organizations she belonged to since she was 16?

4 MR. BAIRD: Sixteen.

5 MR. JUSTICE BLACK: And we have to take it as  
6 though that were answered and answered truthfully?

7 MR. BAIRD: Yes, I think so. We alleged in our  
8 verified petition to the Arizona Supreme Court that this was  
9 answered fully and truthfully and this was not really denied  
10 at all. As a matter of fact, the committee has stated in its  
11 position before the Arizona Supreme Court, that the only reason  
12 that they are keeping Petitioner from practicing law is her  
13 refusal to answer Question 27, thus clearly --

14 MR. JUSTICE BLACK: Well, why doesn't 25 cover it?

15 MR. BAIRD: Because Question 27 asks --

16 MR. JUSTICE BLACK: Unless they are trying to get  
17 her to swear there that the Communist Party --

18 MR. BAIRD: I think the purpose for this question is  
19 -- well, the answer is that she has answered Question 25, so  
20 insofar as they would need that information to find referneces  
21 to investigate Petitioner's background and conduct, they can get  
22 it, because they have all of the groups to which she belonged.

23 MR. JUSTICE BLACK: How many were they, do you know?

24 MR. BAIRD: I can't remember, but insofar as that  
25 is a valid purpose, they can use the answer to Question 25 and

1 find these references.

2 MR. JUSTICE BLACK: Did she give women's associa-  
3 tions and clubs?

4 MR. BAIRD: I think the Girl Scouts is one of them  
5 that was on the list.

6 Insofar as there was a valid purpose it could be  
7 served by her answer to Question 25, because she was probably  
8 required under Konigsberg and Anastaplo to answer a question  
9 asking for membership, because there is a possible valid pur-  
10 pose. But, to ask Question 27, having already answered  
11 Question 25, they need it now to investigate one's beliefs.  
12 And it is our position here that beliefs are not a legitimate  
13 subject for inquiry.

14 MR. CHIEF JUSTICE BURGER: Are you suggesting that  
15 on the record as it now stands before us this case is in the  
16 same posture as it would be if she had answered 27 by saying,  
17 "I have already answered this question. See question and  
18 answer to 25."

19 MR. BAIRD: No, it really isn't, Mr. Chief Justice.

20 MR. CHIEF JUSTICE BURGER: It is a different  
21 question.

22 MR. BAIRD: It is a different question, because  
23 Question 27 asks --

24 MR. JUSTICE BLACK: Well, it's not a different  
25 question about her belonging to associations, is it?

1 MR. BAIRD: Well, yes, insofar as the Communist  
2 Party --

3 MR. JUSTICE BLACK: This one asks all the associa-  
4 tions and this picked one out in particular.

5 MR. BAIRD: As well as asking whether, in effect,  
6 are any of those organizations you listed in response to  
7 Question 25, did any one of them advocate overthrow of the  
8 Government by force and violence?

9 MR. JUSTICE BRENNAN: Evidently, Mr. Baird, you  
10 believe that is an inquiry into belief only from the response  
11 that the committee itself made. You don't find that on the  
12 face of that question, do you?

13 MR. BAIRD: That is correct. It has been supplement-  
14 ed by the committee, apparently coming forward as a must under  
15 N.A.A.C.P. versus Alabama, to come forward with a compelling  
16 state interest to move into the area.

17 MR. JUSTICE WHITE: Well, what do you think the  
18 state now argues in this Court as to what the reason for the  
19 questions?

20 MR. BAIRD: I think that reading the brief of  
21 Respondent, that the text of their answer has changed somewhat.

22 MR. JUSTICE WHITE: So, who should we believe, the  
23 Bar Committee or their -- the Bar Committee's views as expressed  
24 in the court below or the Bar Committee's views as expressed  
25 here now?

1 MR. BAIRD: Well, I think you should probably ask  
2 them, but I submit that it should be --

3 MR. JUSTICE WHITE: Well, would you accept whatever  
4 answer they give?

5 MR. BAIRD: No; I would not. I think that it should  
6 be the committee's answer which was presented to the Arizona  
7 Supreme Court which ruled on the basis of that memorandum of  
8 points and authorities, thereby, presumably adopting the  
9 position of the committee, because they had no opinion.

10 MR. JUSTICE WHITE: But what if the judgment is  
11 sustainable on another ground?

12 MR. BAIRD: You mean you would just ignore the  
13 political belief point and move into some other substitute --

14 MR. JUSTICE WHITE: Well, what the state now asserts  
15 would sustain the --

16 MR. BAIRD: I think that --

17 MR. JUSTICE WHITE: -- Wouldn't that stand up --

18 MR. BAIRD: -- I understand the appellate procedure  
19 is the general rule that you must present the issues to the  
20 lower court as a normal matter before they can be presented  
21 here. However, this is certainly within the discretion of this  
22 Court to waive; I am sure.

23 MR. JUSTICE WHITE: But they are all First Amendment  
24 claims; aren't they?

25 MR. BAIRD: Our points are First Amendment, as well

1 Fifth Amendment.

2 MR. JUSTICE WHITE: So the First Amendment claim  
3 was presented in the lower court and if the judgment of the  
4 lower court on the First Amendment claim is sustainable on  
5 another First Amendment ground, is that improper appellate  
6 practice?

7 MR. BAIRD: I would say that insofar as this case  
8 is concerned, yes; because before the Arizona Supreme Court the  
9 attack was clearly on political belief.

10 MR. JUSTICE BRENNAN: Well, what about this, Mr.  
11 Baird -- I notice on reading Mr. Wilmer's brief at Page 3. He  
12 says this: "The Committee has made it abundantly clear that  
13 regardless of the political views and beliefs of Sara Baird,  
14 it is only if she is found to actively believe in the notion  
15 and espouses activist's role in implementing the notion that our  
16 government be destroyed by force and violence, that a favorable  
17 recommendation will be refused her by the committee."

18 I gather the argument is that they asked the  
19 question only to elicit the answer to -- an answer to something  
20 like this and if she doesn't answer it, that she absolutely  
21 believes in or espouses an activist's role; that then she would  
22 be admitted to the Bar; is that right?

23 MR. BAIRD: Apparently, but that statement is a far  
24 cry from the statement that they --

25 MR. JUSTICE BRENNAN: Well, it certainly is.

1 It's a far cry from what they stated in court in the memorandum.

2 MR. BAIRD: Before the Arizona Supreme Court it  
3 said that it would lead to an investigation as to whether or  
4 not the applicant presently entertains the view and if so, then  
5 they would reject the application.

6 MR. JUSTICE BRENNAN: Now we are posed, though;  
7 or are we, in your view, with deciding this on the basis of the  
8 memorandum or deciding this on the basis of the argument in the  
9 brief; which?

10 MR. BAIRD: I submit that it should be decided on  
11 the basis of the issues as presented to the Arizona Supreme  
12 Court.

13 MR. JUSTICE BRENNAN: I suppose you would. Let me  
14 ask you this: do you suppose the committee, if indeed, its  
15 question were directed to what it has now said it was directed  
16 to, that constitutionally Miss Baird has any claim?

17 MR. BAIRD: Yes, I do. I read the Committee's  
18 statement as still encompassing belief, because it says,  
19 "actively believe;" I still say that that refers to her  
20 belief, as opposed to -- "and espouses" -- the greatest extent  
21 would involve speech, and that does not come close to the  
22 Brandenburg decision this Court enunciated just last term  
23 where it said that, "You must espouse, direct at toward action,  
24 and it is likely to produce action of an imminent violent sort,  
25 or something to that nature, which is really, again, a far cry

1 from this statement by the Committee.

2 MR. JUSTICE STEWART: But Mr. Brandenburg wasn't  
3 an applicant to the Bar of Arizona.

4 MR. BAIRD: That is absolutely correct. No  
5 question about that.

6 MR. JUSTICE STEWART: What's the posture of this  
7 case, procedurally? I'm thinking I have in mind -- concerned  
8 about the finality. In other words, if this Question 27 were  
9 answered no, I suppose that would be the end of the case?

10 MR. BAIRD: I assume so.

11 MR. JUSTICE STEWART: And since it hasn't been  
12 answered at all, is it a final judgment over which we can  
13 properly take jurisdiction?

14 MR. BAIRD: I think so. In Konigsberg and Anastaplo,  
15 they did not answer the questions with respect to their asso-  
16 ciations and it seemed to be final and in Schneider versus  
17 Smith, where a Merchant Marine applicant was involved, he  
18 refused to answer questions at that time. If he had answered  
19 them, I suppose that would have disposed of the case.

20 MR. JUSTICE STEWART: Well, sometimes I don't have  
21 in mind the precise posture of those cases, but sometimes it  
22 results in contempt and what not; but that hasn't happened here.

23 MR. BAIRD: No.

24 MR. JUSTICE STEWART: It's just pending. This is  
25 just pending and if the answer is "no" to that question, then

1 that's the end of it, I suppose; she's admitted to the bar.

2 MR. BAIRD: I suppose so.

3 MR. JUSTICE STEWART: And if the answer is "yes,"  
4 then there may be more proceedings and she may or may not be  
5 admitted to the bar.

6 MR. BAIRD: Yes.

7 MR. JUSTICE STEWART: Why is it anything final over  
8 which we have jurisdiction at this juncture?

9 MR. BAIRD: Because I don't believe that the com-  
10 mittee can require an answer to an unconstitutional question  
11 which is posed to seek out political belief; to --

12 MR. JUSTICE WHITE: Yes, but that isn't what the  
13 question asks.

14 MR. JUSTICE STEWART: No; that's not my point at  
15 all.

16 MR. JUSTICE WHITE: That isn't what the question  
17 asks. You are just relying on the statement as to what they  
18 would do if she answered the question or the reason for the  
19 question.

20 MR. BAIRD: The question requires her to make a  
21 judgment and the burden, presumably, is on her to see whether  
22 they advocate the overthrow of the government by force and  
23 violence. This requires to deal and grapple with the issues of  
24 the Smith Act and that kind of a burden was specifically con-  
25 demned in Speiser versus Randall, where it said that the burden



1 in this area should not be applied on the person who seeks --

2 MR. CHIEF JUSTICE BURGER: Is this a First Amendment  
3 argument?

4 MR. BAIRD: Yes, it is, because it would make one  
5 very much less likely to join an organization if he has to  
6 always make judgments as to whether that organization advocates,  
7 and if he misses in his judgment as to whether that organization  
8 advocates, he can be prosecuted for perjury. It probably  
9 wouldn't stand up, but he could be prosecuted; this is under  
10 oath.

11 MR. JUSTICE HARLAN: Well, am I wrong in thinking  
12 that Mrs. Baird will not be admitted to the bar -- the record  
13 shows that she would not be admitted to the bar unless she  
14 answers the question?

15 MR. BAIRD: Unless she answers the question she  
16 will not be admitted to the bar.

17 MR. JUSTICE HARLAN: Doesn't the record show that?

18 MR. BAIRD: Yes.

19 MR. JUSTICE HARLAN: Well, I would suppose  
20 there is plenty of finality in that.

21 MR. BAIRD: Yes, I think that there probably would  
22 be.

23 The very last point is our Fifth Amendment argument,  
24 and this is simply to the effect that if an answer is required  
25 and if the answer were yes, it would be an incrimination

1 circumstances in a link in the chain. If Spevack versus Klein  
2 is to be applied to the bar admission area as opposed to the  
3 disbarment area, it seems to us that logically Petitioner  
4 would be able to be a member of the Bar of Arizona, solely  
5 and entirely upon the Fifth Amendment.

6 We respectfully request that the decision of the  
7 court below be reversed.

8 Thank you.

9 MR. CHIEF JUSTICE BURGER: Case is submitted.

10 (Whereupon, at 2:30 o'clock p.m. the argument in  
11 the above-entitled matter was concluded)

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