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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RANDALL KOWALKE, *Plaintiff*, vs. DAVID EASTMAN, STATE OF ALASKA DIVISION OF ELECTIONS, and GAIL FENUMIAI, *Defendants*.	)	Case No. 3AN-22-07404 CI

DEFENDANT DAVID EASTMAN'S SUPPLEMENTAL BRIEF

Pursuant to this Court's order of December 15, Defendant David Eastman ("Representative Eastman"), by and through the Law Offices of Joseph Miller, LLC, hereby files this Supplemental Brief addressing two questions: 1) Was the original intent of Art 12, § 4 to bar from public office mere membership absent conduct; and 2) Whether the Alaska Constitution (or the First, Fourteenth, or other amendment of the United States Constitution) requires more than that mere membership absent conduct?

I. The original intent of Art 12, § 4

There is almost no reference to the Article 12, § 4 disqualification clause in the Alaska constitutional convention of 1955-56. The drafting committee first proposed the language on December 16, 1955, simply noting that it "conforms with the language of the Congressional enabling bills." Const. Conv. Committee Proposal 12 (Dec. 16, 1955). Delegate V. Rivers confirmed that understanding on January 21, 1956, noting that "the

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wording is that of the enabling act and is one of the requirements." Proceedings, pp. 2805-06 (Jan. 21, 1956).[1] On January 30, 1956, the Committee on Style and Drafting made minor stylistic changes to the Committee's proposed language, and its version became the language that was ratified. There was a brief discussion on February 3, 1956, about whether a comma after the first use of the word "advocates" was necessary, Proceedings, 73rd Day, p. 3893, during which the Chairman of the Committee on Style and Drafting, Delegate Sundborg, confirmed that the comma was necessary because both "advocacy" and "aids or belongs to" an organization that advocates are covered by the clause. But that brief discussion tells us nothing about whether membership alone was sufficient under the "aids or belongs to" clause set out by the commas. There was no further discussion of the provision during the convention.

The enabling act to which the Committee and Delegate Rivers referred was actually a "bill," not an act, as it was never adopted by Congress. And it was two bills which had been simultaneously introduced, S.49 in the Senate, and H.R.2535 in the House of Representatives. Both were titled "A Bill To enable the people of Hawaii and Alaska each to form a constitution and State government and to be admitted into the Union on an equal footing with the original States."[2] Section 203 of those bills provided in relevant part:

> The constitution shall he republican in form, shall make no distinction in civil or political rights on account of race or color, shall not be repugnant,

[1] Available at https://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Day%2060%20-%20January%2021%201956%20-%20Pages%202802-2878.pdf.
[2] The bills were part of the Alaska constitutional convention record, Folder No. 180.7, and are available at https://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Folder%20180.7.pdf.

> to the Constitution of the United States and the principles of the Declaration of Independence, *and shall provide that no person who advocates, or who aids or belongs to any party, organization, or association which advocates, the overthrow by force or violence of the Government of the State of Alaska or of the United States shall be qualified to hold any public office of trust or profit under the State constitution.*

Id. (emphasis added). The bills were referred to committee without discussion or action on the floor.

Prior to those bills, introduced in the 84th Congress, bills had also been introduced in several prior Congresses to enable the people of Hawaii to form a constitution and apply for statehood. *See, e.g.*, H.R. 3575, 83rd Cong. (1953). Several of those bills contained similar language, and during various debates over the bills, there was a lot of concern expressed about communist party infiltration of the labor movement in Hawaii.

The language appears to have had its origin in the Smith Act that was adopted in 1940. The bills that became the Smith Act included a section that criminalized advocacy for the overthrow of the government by force or violence or organizing a group for that purpose, and another section providing for the deportation of aliens who engaged in such activity or who were members of an organization that advocated for the overthrow of the government by force or violence. During congressional debates over the Smith Act's deportation provision, some members of Congress argued that the intent was to make membership in any organization advocating the overthrow of this Government by force or violence, at any time, and without regard to its duration or continuance, a ground of exclu-

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sion or of deportation. *See, e.g.*, Cong. Rec. 10361 (July 28, 1939, Rep. Reed). Others indicated that membership alone was insufficient. Representative Murdoch noted his view that "that many of our courts have held that membership in the Communist Party is sufficient to warrant or support deportation," for example, but Representative Hobbs disputed that characterization, noting that the proofs made in the individual case demonstrated that the defendant himself "advocates the overthrow of this Government by violence." *Id.* at 10447 (July 29, 1939). Perhaps most significantly, Representative McCormack noted that the bill was targeted to communists, and he described the reason at some length:

> A Communist is one who "knowingly or willfully" is committed to a movement which has as its objective the ultimate overthrow of government by any means, legal or illegal, or a combination of both. We all know that the Communist movement has as its ultimate objective the overthrow of government by force and violence or by any means, legal or illegal, or a combination of both. That testimony was indisputably produced before the special committee of which I was chairman, and came from the lips not of those who gave hearsay testimony, but of the actual official records of the Communist Party of the United States, presented to our committee by the executive secretary of the Communist Party and the leader of the Communist Party in the United States, Earl Browder. That was the testimony, the best evidence presented to our committee at that time, that such is the objective of the Communist Party. Therefore, a Communist is one who in-

> tends knowingly or willfully to participate in any actions, legal or illegal, or a combination of both, that will bring about the ultimate overthrow of our Government. He is the one we are aiming at, and the Government should have the burden of proving that a person "knowingly or willfully" advocates the overthrow of government and is "knowingly or willfully" a member of an organization that believes in the ultimate overthrow of our Government.

Representative McCormack had a significant role in the debates, and he was the sponsor of another bill that had already passed the House, which included the language that eventually became the Smith Act. What he suggests in this statement on the floor of the house is that more than mere membership in an organization that might have some members who engage in violence against the United States is required. A knowing or willful membership "of an organization that believes in the ultimate overthrow of our Government," which "has as its ultimate objective the overthrow of government by force and violence or by any means, legal or illegal, or a combination of both," is necessary.

Without discussion in the Alaska constitutional convention, it is not possible to ascertain whether the intent of those who drafted and ratified Article XII, Section 4 of the Alaska Constitution intended membership alone to suffice, or whether the membership had to be a knowing and willful affiliation with an organization that sought the overthrow of the government by force or violence. It is also uncertain from the debates in Congress over the Smith Act which of those two positions reflects the original intent of those who voted for the Smith Act. One thing is clear from those debates, however, and that is that

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the organization itself had to espouse the goal of overthrowing the government by force or violence in order for the criminal sanctions set out in the act to apply. The Act was clearly aimed at the Communist Party, which expressly espoused such a goal. That purpose is therefore far removed from groups like the Oath Keepers, which not only does not expressly espouse such a goal but expressly forbids it in its bylaws and instead espouses the express goal of the contrary purpose of upholding the Constitution and of keeping the Oath to do so.

II. If Mere Membership In A Group Some of Whose Members Engage In Violence Is Sufficient to Disqualify, Article XII, § 4 Is Patently Unconstitutional.

Shortly after Alaska adopted its Constitution and the Article XII, § 4 disqualification clause contained therein, the Supreme Court held that an interpretation of the Smith Act covering mere advocacy—even advocacy to overthrow the government by force and violence—was unconstitutional, a violation of the First Amendment's protection of the Freedom of Speech. *Yates v. United States*, 354 U.S. 298, 320 (1957), *overruled on other grounds*, *Burks v. U.S.*, 437 U.S. 1 (1978). The trial court's jury instruction "that the proscribed advocacy must include the 'urging,' 'necessity,' and 'duty' of forcible overthrow, and not merely its 'desirability' and 'propriety,' may not be regarded as a sufficient substitute for charging that the Smith Act reaches only advocacy of action for the overthrow of government by force and violence," the Court held. *Id.* at 324. In so holding, it clarified and distinguished its prior decision in *Dennis v. United States*, 341 U.S. 494 (1951), by emphasizing that the jury instruction in that case recognized not only that abstract doctrine of overthrowing the government by unlawful means was insufficient, but that "the

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teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action," was required. *Id.* at 326 (quoting *Dennis*, 341 U.S. at 511-12). In other words, as the jury instruction in *Dennis* continued, defendants could not be convicted unless: 1) "they conspired … to advocate and teach the duty and necessity of overthrowing or destroying the Government of the United States by force or violence"; 2) "with the intent that such teaching and advocacy be a rule or principle of action"; and 3) "by language reasonably and ordinarily calculated to incite persons to such action"; and 4) "all with the intent to cause the overthrow … as speedily as circumstances would permit." *Id.*

After setting out that standard, the *Yates* Court ordered the reversal of the convictions of five members of the Communist Party despite acknowledging that advocacy of the abstract doctrine of forcible overthrow of the government was one of the tenets of the Communist Party. The evidence of advocacy as a call to forcible action at some future time was "strikingly deficient," the Court held, as there were "only a half dozen or so scattered incidents which, even under the loosest standards, could be deemed to show such advocacy," and most of those were not connected with any of the defendants. *Id.* at 329-30. None of the five, the court continued, had "engaged in or been associated with any but what appear to have been wholly lawful activities." *Id.* at 330. Furthermore, the Court added, "it is difficult to perceive how the requisite specific intent to accomplish

such overthrow could be deemed proved by a showing of mere membership or the holding of office in the Communist Party."[3] *Id.* at 331.

Given that the issue here is whether Representative Eastman's "mere membership" in Oath Keepers and engagement only with "wholly lawful activities" could disqualify him for office because of what Plaintiff has contended is the advocacy to action by others with the specific intent to overthrow the government, *Yates* is dispositive.

Moreover, the kind of conduct that *Yates* allowed to be prohibited – advocacy for lawless action even in the future – was further narrowed a decade later in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In that case, the Supreme Court reiterated that the First Amendment protects "mere advocacy" of the necessity of a resort to violence as a means of accomplishing political reform, distinguishing that protected speech from "incitement to imminent lawless action," with a heavy emphasis on "imminent." The case involved Ohio's Criminal Syndicalism Act and the conviction under it of a Ku Klux Klan leader who spoke at a rally of KKK members, some of whom were armed with rifles and shotguns. In his speech, Brandenburg threatened "that there might be some revengeance taken" "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race," and also made an explicit reference to action they would soon be taking: "We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi." Overruling *Whitney v. California*, 274 U.S. 357

[3] With respect to 9 other defendants, the Court found that there was sufficient evidence to support a jury verdict of advocacy to action, with specific intent, to constitute conduct that was prohibited by the Smith Act, had a proper jury instruction been given. The charges against those 9 were therefore remanded for retrial.

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(1927), which had upheld California's similar statute, the Court held that Ohio's statute prohibited constitutionally-protected speech. The First Amendment's "guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," the Court held. 395 U.S. at 447. Although the Court recognized that "the mere abstract teaching … of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action," *id*. at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)), the Court added that the Ohio statute was invalid because it not only purported "to punish mere advocacy" but also because it purported "to forbid, on pain of criminal punishment, assembly with others *to advocate the described type of action*." *Id.* at 449 (emphasis added). To be constitutionally permissible, a statute had to distinguish between "mere advocacy" and "incitement to imminent lawless action." *Id.*

Almost all of the evidence presented by Plaintiff in this case (by way of materials on which his experts relied) is clearly protected speech. The November 3, 2020, email from Oath Keepers founder Steward Rhodes to the general Oath Keepers membership, for example, includes a number of statements that are pure political speech, such as: "We face an open, now obvious insurrection against our Constitution being waged by the American Marxist left"; "This election is part of a deeper, ongoing life and death struggle between liberty and a totalitarian nightmare future"; and "the Marxist controlled Democratic Party, and all their allies, are pulling out all the stops in a desperate attempt to steal

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the election, take power, and destroy this nation once and for all." Ex. 6. That same email did contain calls to action, but they were explicitly calls to *legal* action, not *illegal* action, such as: "[W]e encourage all of our members, supporters, and readers to do likewise – assist in your local areas in keeping an eye on the election today and in the days to come, to keep it as clean and legitimate as we can, in the face of expected widespread fraud by the left, and likely attempts at intimidation and violence by radical leftists"; "In 2016, … [o]ur members coordinated closely with local law enforcement, and reported all suspicious activity to them. We also complied carefully with all local and state laws and regulations on activity at or near polling places. We will be doing the same today;" and "Oath Keepers and partriots, as you stand watch today, you will be under a microscope, so be sure you are in strict compliance with the rules." *Id.*

Plaintiff also introduced, by way of the statement of offense in a plea agreement that had been entered by another member of Oath Keepers arising out of his activities on January 6,[4] evidence of discussions in a signal chat group among a small number of Oath Keepers members, including its former President, Stewart Rhodes. Many of those discussions are protected speech. Some raise concerns about possible violence, but encourage participants to be prepared to respond to violence, not to initiate it. That, too, is therefore protected speech. Others might be interpreted as advocating for members to initiate violence, but in the future, not "imminently," and are therefore protected under the Supreme Court's decision in *Brandenburg*.

[4] Although the Court has admitted the plea agreements and accompanying statements of offense not just for the fact of conviction but for the truth of the facts set out in the agreements and statements, Rep. Eastman has moved for reconsideration of that ruling primarily on the ground that plea agreements, from which the defendant anticipates to derive benefit by way of a more lenient sentence, do not have the requisite indicia of reliability to qualify for the hearsay exception of statements against penal interest.

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Finally, there is a small subset that can arguably be interpreted as preparation for imminent action that would be contrary to law. The plea agreements, if taken for the truth of the matters contained therein, could be read to support such an interpretation, and the jury verdicts might similarly be read similarly to some extent as well. But there are two principal reasons that even those statements don't qualify as "advocacy" by the Oath Keepers organization, as an organization, for the overthrow of the government by force or violence, as would be required to trigger application of Article XII, § 4's disqualification clause.

First, none of the plea agreements, and none of the indictments, and none of the convictions that have heretofore been obtained, reference any conduct that qualifies as an attempt to overthrow the government. Several Oath Keepers members were charged with Seditious Conspiracy under 18 U.S.C. § 2384, but as we noted in our prior briefing on the motion to dismiss, that criminal statute covers several different kinds of conduct, including conspiracy "to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them" as well as "to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States." Only the latter two are alleged in the various criminal complaints. None charge conspiracy to "overthrow" the government or to "levy war" against it, and none of the plea agreements or convictions mention "overthrow" of the government or "levy war" against it.[5] Neither the plea agreements nor the convictions obtained after trial can serve

[5] *See*, *e.g.*, Ex. 26, Plea Agreement, *United States v. Brian Ulrich*, No. 22-cr-15 (D.D.C.) (pleading guilty to Seditious Conspiracy and Obstruction of an Official Proceeding); Ex. 27, Statement of Offense ¶ 4, *id*. (Conspiracy for "deploying force to prevent, hinder, and delay the execution of the laws"); Ex. 20, Indictment ¶ 15, *United States v.*

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as predicate for the Article XII, § 4 requirement of advocating (or aiding or belonging to an organization which advocates) for the overthrow of the government by force or violence, therefore. Mere opposition by force to the authority of the United States, or the use of force to prevent the execution of the laws of the United States, does not constitute the "overthrow" of the United States.

Second, even if the evidence contained in the guilty pleas and found by the jury in the convictions could qualify as evidence that was "tantamount" to overthrowing the government, as Plaintiff's experts claimed, the Supreme Court has made quite clear that illegal conduct by some members of an organization cannot be attributed to other members of the organization, either criminally or civilly, without "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.'" *Scales v. United States* , 367 U.S. 203, 229 (1961) (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961)); *Yates*, 354 U.S. at 331 ("mere membership" insufficient); *see also Healy v. James*, 408 U.S. 169 (applying same principle in a noncriminal context). In *Healy*, the Court held that "[t]he government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." 408 U.S. at 186.

Applying the lessons of these cases in a context similar to that at issue here (namely, whether criminal, violent actions by some members of an organization can lead to civil liability for other members of the organization), the Supreme Court made quite clear in

Elmer Stewart Rhodes III, et al., No. 1:22-cr-00015 (D.D.C., filed Jan. 12, 2022) (alleging, in the Seditious Conspiracy count, that "the defendants [including Ulrich] did knowingly conspire, confederate, and agree, with other persons known and unknown by the Grand Jury, by force to prevent, hinder, and delay the execution of any law of the United States"); Ex. 42, Jury Verdict Form, *U.S. v. Rhodes* (finding Rhodes "guilty" of seditious conspiracy "[t]o oppose by force the authority of the United States").

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NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982), that "Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish [1] that the group itself possessed unlawful goals and [2] that the individual held a specific intent to further those illegal aims." Indeed, the Court went further, explicitly noting that "guilt by association is a philosophy alien to … the First Amendment itself," and that "civil or criminal disabilities may not be imposed on one who joins an organization which has among its purposes the violent overthrow of the Government, unless the individual joins knowing of the organization's illegal purposes … and with the specific intention to further those purposes." *Id.* at 932 (internal citations omitted).

Claiborne Hardware is directly on point and controlling. In order to impose a "civil disability," such as the disqualification from office at issue here, because of membership in an organization, it must be proved that the individual joined the organization knowing of its illegal purpose *and* had the specific intent of furthering that purpose. Neither element has been proved here. Indeed, no evidence has been offered on either score. To allow Representative Eastman to be disqualified under Article XII, § 4 for mere membership in the Oath Keepers organization would therefore be an unconstitutional infringement of his Freedoms of Speech and Association protected by the First Amendment to the U.S. Constitution, as incorporated and made applicable to the states by the Fourteenth Amendment, and by the comparable provisions of the Alaska Constitution.

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Conclusion

Under the standards set by the Supreme Court in *Brandenburg*, nearly all of the statements of "advocacy" that have been introduced into evidence here are protected speech, either pure political speech or advocacy for lawful conduct. Even for those statements that might be viewed as advocacy for illegal conduct, most are for conduct contingent on action by others, or for conduct in the future beyond what can be deemed "imminent" action, and therefore also protected.

Assuming that some of the statements contained in signal chats could qualify as incitement to *imminent* lawless conduct and therefore be unprotected under *Brandenburg*, the advocacy is for conduct that falls well short of "overthrowing" or attempting to overthrow the government. It is, rather, conduct to oppose the authority of the United States or to obstruct law enforcement or official proceedings, and that does not suffice to trigger Article XII, § 4's prohibition on advocacy (or aiding or belonging to an organization which advocates) for the overthrow of the government by force or violence.

Finally, even if the conduct of some individuals had risen to the level necessary to trigger Article XII, § 4, that conduct cannot, under *Claiborne Hardware*, be the basis for the imposition of disqualification on other members of the organization who neither joined the organization with knowledge of any illegal purpose nor had the specific intent to further that illegal purpose. As there has been no evidence offered on either element, Article XII, § 4 simply cannot be applied to Representative Eastman without violating his First Amendment speech and association rights.

DATED this 20th day of December 2022, at Fairbanks, Alaska.

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