Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

PAUL M. BROCKINGTON,

Appellant,

vs.

JAMES A. RHODES, GOVERNOR OF OHIO,

Appellees.

Docket No. 31

Place Washington, D. C.

Date October 22, 1969

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C O N T E N T S

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PAUL M. BROCKINGTON,

Appellant,

vs. No. 31

JAMES A. RHODES, GOVERNOR OF OHIO, et al.

Appellees.

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The above-entitled matter came on for argument at 11:10 a.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:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Sheerer, you may proceed whenever you are ready.

ARGUMENT OF BENJAMIN SHEERER

ON BEHALF OF APPELLANT

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

Case No. 31, Brockington vs. Rhodes, is an election case ona ppeal from the Ohio Supreme Court. It is a case that we feel, as this Court has said, deals with matters close to the core of our constitutional system. It follows a case previously decided by this Court under the title Williams vs. Rhodes.

The Williams vs. Rhodes case dealt with the right of third parties to obtain ballot status in Ohio. This case deals with the right of independent candidates to obtain ballot status in the State of Ohio.

We think the case itself raises two main issues. The first issue arises in this manner. Ohio allows independent candidates to secure ballot status through the filing of nominating petitions signed by a certain number of qualified voters.

Now up to 1952 that number was 1 percent. That number was 1 percent for 60-some years. In 1952 the amount was increased to 7 percent.

Now under the 1 percent rule which had existed for 60-some years there was no substantial, no disruptive interference

with the election procedure by independents. In fact, participation by independents was slight, perhaps even minimal in the Ohio election process.

Q Was that 1 percent rule applicable across the board to all independent candidates for any elective office in the state?

A Yes, sir, that is my understanding and, in fact, sir, the 7 percent is likewise applicable across the board.

Q Your client wanted to be an independent candidate for election to the House of Representatives, is that it?

A Yes, sir, that is correct, for the 21st Congressional District, State of Ohio, November 1968 general election.

Now we say that given that history of no disruption, no substantial interference, no over-burdening of the election process. The seven-fold increase in the requirement constitutes a burden on First Amendment freedoms, a limitation of First Amendment freedoms of association and speech and a burden on the right to cast an effective ballot, to participate equally in the election process.

Now the second main issue we see arising is the barrier itself. In our case, for example, my man, Mr. Brockington, the appellant here, would have had to secure 5,974 valid signatures to qualify for ballot. Now the rule of thumb, a politician will tell you, is get 50 percent more. In other words, he would have had to obtain 9,000 signatures most likely, of which perhaps

6,000 would be valid in order to qualify.

Now a party candidate qualifies for the primary, for being on the ballot in the primary by securing 100 signature if it is an office less than statewide or 1,000 signatures if it is the statewide office.

Q But then in order to appear on the ballot in November, he has to win a primary election and get a majority of the voting in the primary.

A Yes.

Q That is many, many thousands.

A That may be the case. We say, however, ---

Q Well, maybe it is, isn't it? Is there any alternative?

A To the ---

Q To get on the final ballot?

A No, sir, it is either through the party primary or as an independent. Those are the two methods that Ohio allows.

Q I think what we were concerned about, you said in response to Justice Stewart's question that he may have to get a majority in his primary.

A My main ---

Q Many thousands of votes.

A My main response was that it might be thousands of votes, depending on the size. That changes it. That is true,

he would have to prevail in the party primary. I was responding mainly only to the size that might be required, because it might be a small election district. That is what I meant when I said that.

Q Well, the party if it only puts up one candidate, he doesn't have to go through a primary at all, does he?

A I would assume that his name would be on the ballot, that persons could cast write-in votes for other people if they wanted to.

Q How do you get on a primary ballot?

A A primary ballot is secured one of two ways. If it is a less than statewide office -- in other words, if it is from a congressional district or something -- you have to obtain the signatures of 100 qualified voters.

Q Of that party?

A Of that party.

Q Yes.

A If it is for Senator, for instance, which would be a statewide office, or Attorney General, you would have to obtain 1,000 signatures of qualified voters of that party.

The difference with the independent, of course, is that he must obtain a number equal to 7 percent of those people who voted for Governor in the applicable district in the last previous gubernatorial ---

Q Do you have any idea how often candidates are

unopposed in a primary?

A No, sir, I don't.

I would say that my feeling is not often, sir.

Q As a general rule in the primary in Ohio is that any significant office, thereis competition for it?

A Yes, sir, I think that is so.

Q This 7 percent requirement that you attack here ---

A Yes, sir.

Q --- which we now know has been reduced to 4, but in any event, ---

A Yes, sir.

Q --- those can be signatures of members of the Republican Party or of the Democratic Party or no party?

A Yes, sir.

Q Or some other third party, is that correct?

A That is my understanding.

Q It is not limited to people who have not voted in party primaries, for example, is he?

A No, sir, he is not.

Q The whole field is open to him as a registered voter?

A Yes, sir.

We think that no only through comparison of the disproportion of 100 signatures, for instance approximately 6,000 here, but also the erection of the barrier itself, the erection

of the 7 percent or now the 4 percent offends the equal protection clause and is violative of it, that the equal protection clause in the election area deals with fundamental rights and the classifications that might limit or restrict these rights are carefully scrutinized and closely confined to whatever might be determined to be the necessity of the case.

Now the particular facts in which this case arise are these: As as been noted, the appellant was an independent candidate for the 21st Congressional District in November of 1968. His petitions were good and sufficient except for the signature requirement, the number of signatures required.

When he was turned down for ballot position, this suit was filed, for mandamus against various officials of the State of Ohio having to do with the election process.

The theory of the suit was this: From the beginning we have urged in this case that the 7 percent requirement was unconstitutional as violative of the First and Fourteenth Amendments. This being so, we said, he does satisfy the 1 percent requirement. The 7 percent requirement being unconstitutional, the thing to do is to certify him for the ballot.

He met the 1 percent requirement. The amendment to the 7 percent being held unconstitutional as void and of no effect, the 1 percent require is in effect and he should have been given ballot status.

Now at trial, the Trial Court agreed that he met the

constitutional requirements for the office. The essential facts of the case are admitted on the record in the Trial Court. The Trial Court seemed to indicate that it believed that only the legal issue remained, the constitutionality of the increase.

Nevertheless, in its opinion it ruled against us. Its opinion to me can best be described as opaque. I am not sure of the basis of the ruling.

Appeal was promptly taken to the Court of Appeals of our state. We made several attempts to get on the ballot at that point. We asked for a temporary restraining order. That was denied.

By this time this Court had acted in the Williams case and had placed Governor Wallace on the ballot in Ohio, depending upon the determination this Court made. We suggested that the Court of Appeals do likewise. That is, if Mr. Brockington won his suit there, he would be on ballot; if not, he could be blocked out.

We brought the decision of the thre-judge District Court and the Socialist Labor Party, the Williams vs. Rhodes case to the attention of the Court of Appeals. Nevertheless, they ruled against us without opinion.

We then went to the Ohio Supreme Court. We obtained a prompt hearing there. I think it was October 16. This Court had just decided the Williams vs. Rhodes case. I brought that case to the Court's attention. Nevertheless, the Court, and

beofre the election, dismissed our appeal sua sponte as involving no substantial constitutional question.

We took appeal to this Court. Probable jurisdiction was noted. Now since that time the Ohio Legislature has reduced the percentage to 4 percent.

I am here to urge today that the 4 percent requirement is unconstitutional, that this Court should still act in this case, that the case requires a decision and that the appellant deserves a decision from the Court on these important issues.

Now throughout this case, to my mind, the appellees have refused to deal with the constitutional issues. We challenged them in the courts below to do that. I don't think they have done it at any point.

Now my conclusion is they have not and for this reason: That the 7 percent increase was patently unconstitutional and is unconstitutional and that the 4 percent requirement is also unconstitutional. I say this for two reasons: First of all, the 60-year history, the 60-year history of an election system running without problems under a 1 percent requirement.

Q Before you get to the merits, ---

A Yes, sir.

Q If you have mentioned the question of mootness, I have missed it. I trust you will before you conclude this.

A I would be happy to respond to that at this time, Your Honor.

It is true that the election is passed.

Q Here I am looking at the relief you asked, at page 8 of the appendix, was not for a declaratory judgment, but this was an action mandamus in which you directed yourself to getting your client on the ballot for a specific election, i.e., the election of November 5, 1968, and no other.

There is no request for general declaratory relief. And I was wondering if quite apart from the fact that the statute has now been amended to reduce the requirement from 7 percent to 4 percent, quite apart from that, I was wondering if this isn't moot just by reason of the fact the relief that you ask is now impossible to be accorded to you. You didn't ask that the election be set aside, or ---

A No, sir. I would hope not, Your Honor, and I believe it should not be regarded as moot. First of all, although I am not sure, I kno in Ogilvy vs. Moore, recently decided by this Court, the election had passed; whether prayer was for declaratory relief, I don't know at this point. It was not established as authority at this time.

Your Honor, I believe the mootness rule is a judicial rule, not mandated necessarily by the Constitution, although perhaps by the case in controversy ruled the Constitution. But, in any event, we have had in this case a case that was contested through three lower courts as a completely adversarial proceeding.

The appellees here were at every proceeding, filed briefs, argued the case. I can assure you it was hotly contested.

Q Mr. Sheerer, isn't at least a partial answer that the Ohio Supreme Court did not treat this case as moot?

A Yes, sir, I think ---

Q That it was not decided on the basis of remedy. They got to the constitutional issue, didn't they?

A I believe they did, Your Honor.

Q Well, as to the Ohio Supreme Court, and correct me if I am mistaken, decided this before the election, for which you asked relief?

A Yes, that is correct.

Q It obviously wasn't moot them.

Q Did they decide the constitutional issue?

A They did decide the constitutional issue, Your Honor. One of the appelless makes the suggestion that the dismissal there was because they couldn't grant relief. But if that was so, I think they would have said so.

They said that they found no substantial constitutional issue involved. I think it has been litigated and litigated soundly on the merits of three courts below.

Secondly, I would like to point out that election cases are treated differently, I believe, than other cases. Election cases are peculiarly difficult to get complete and adequate

review on.

They just are a fact of life. Naturally the opponent in an election case wants to delay, he wants to get the election over, and so it is just almost impossible to get adequate and complete review on these cases, and yet the question comes up again. This is not a question that will be finally determined now if this Court does not resolve it.

Q Are you suggesting that we now treat it as though you had sought declaratory judgment?

A Yes, sir, if that is possible.

Q On what authority do you suggest we do that?

A Well, sir, I don't have specific authority as to the capability of the Court to do that. I do say this: That this not an unnecessary question. It is a question that will come up again, and that the mere fact that we did not include an allegation in the court below when this case was submitted should not be determinative of this issue.

This is not an academic question, as I say. It will come up again. Election matters tend to recur, and many times the courts have said that where it is a matter of great and public importance, where it transcends the individual case, we will go ahead and decide this point for the benefit of the public to preserve the electoral process, to enhance it, and the cases to that effect are cited in our briefs, Your Honor.

Q But, Mr. Sheerer, you have asked for mandamus

that is an action at law?

A Yes, sir.

Q To enjoin the enforcement of the statute as an equitable action?

A I didn't hear.

Q To enjoin the enforcement of the statute would be an equitable action.

A Well, sir, what we said --

Q What do you want us to tell the Supreme Court of Ohio, to grant mandamus?

A We want this Court to say, Your Honor, that the courts below were in error, that they should have held that the 7 percent requirement was unconstitutional and that the 1 percent requirement was in effect. Now what we are asking ---

Q You said that he should be put on the ballot?

A Yes, sir, that he should be ---

Q He should have been put on the ballot?

A That he should have been granted ballot status.

Q Do you have any case that suggests that you can do that in a mandamus action?

A Well, sir, we do cite ---

Q You have made no effort to change the mandamus action. You have got the same prayer now today that you had then.

A Yes, sir, that is true. However, the thrust of

our lawsuit is --

Q Sua sponte we could give it declaratory judgment?

A Well, sir, the thrust of our lawsuit has always been that the 1 percent requirement was appropriate and the 7 percent was not.

Q What about one and a half?

A Well, sir, we say this: That the 60-year history shows that it had been in existence for 60 years, that there was no need for an increase. Now I am not suggesting to the Court that it sanctify or hold that the 1 percent requirement is constitution, because I don't think that is quite the issue here, and I am not clear in my own mind whether 1 percent could be said to be constitutional.

Q I presume somebody will have to decide that, maybe like a Legislature, would it?

A I am not asking the Court to substitute its judgment for the Legislature here. What we are saying is this: That where there has been this type of history and no interference or disruption, the Legislature cannot just increase -- make increases seven-fold, driving independents and minority parties off the ballot. They cannot show a justification for this increase.

Now as to the validity of the 1 percent requirement itself, I take it that could be the subject of litigation at some time if someone wanted to litigate it.

Q What should we do about the statute on that?

A I am not entirely clear on that, Mr. Justice.

Q Now my next question was going to be, if it was, what was it for?

A Well, again I have to respond to my historical argument that it just was not great participation, that there was hardly any independent activity and then to raise it seven-fold just about ended independent activity, and also there was a historical fact --

Q Well, you think 4 is equally infirm?

A Yes, sir. And of course if we cannot prevail here, I am sure the 4 percent statute is going to be the subject of litigation. We would like to avoid that if we could; we would like to avoid another long process of litigation when we think the issues could not be presented any differently to this Court if it came back again.

I cannot conceive of the question being different at all before this Court if it were brought back again. I think that exactly the same contending issues would be before the Court if it came back.

Q Is there some contention that this man wants to run again?

A I am not clear, Your Honor, whether he will or not. Certainly within the ---

Q He might though.

A Yes, sir, I think it is possible that he might.

He has had a taste of it and he wasn't very successful.

Q Has has had a taste of not running.

A He was able to run as a write-in candidate, of course, thanks to the relief we got in the three-judge Federal Court in the Socialist Labor Party case.

I am not entirely familiar with the case of Carroll vs. Princess Anne, but I recall that that was a case in which relief could not be granted. I believe it was an injunction case as to whether or not that was declaratory judgment, prayer in that, I am not sure, but I do remember that was a case in which it was a question considered of such public importance that this Court decided it.

Now in addition to the history which we believe is of vital importance here, this Court has held in the area of the election cases, I believe. No. 1 is that there is sanctity in the individual ballot, that every man's vote is to equal the other's and thatour guarantee is the right to cast an effective ballot.

Secondly, the Constitution guarantees free and equal competition in the areas of ideas in governmental policy in the electoral process. The First Amendment and the electoral process are inextricably intertwined.

Finally, that minority and independent candidates are not to be subjected to needless disadvantage. Now in determining whether a statute can pass constitutional muster in this area,

the Court has said it will look at the facts and circumstances of the law, look at what the state claims to be protecting and look at the interests that are disadvantaged by the law.

And to allow for it there must be a compelling state interest. We suggest no state interest can be advanced, has not been advanced or could be advanced where this seven-fold or the four-fold increase is. We hope the Court will act, will indicate that the 1 percent was a ceiling beyond which the Legislatures could not go.

Help us restore some health to the Ohio election process. Free us so that in the on-coming months the Legislature can take further action if they want to or so the independents can participate, minority parties can participate in this election process.

Otherwise, the result is going to be that people will be frozen off the ballot and that there will be a necessity for further litigation on a question that is squarely before the Court on this record.

Q Do you say that it is not a permissible or permissible state interest to take some measures to preclude multiple splinter parties?

A I believe not, Your Honor.

Q None at all?

A I believe not. I believe there is nothing in the Constitution that requires that. That Constitution is neutral on

parties. It does not enshrine them or give them any special sanctity. Now I do not maintain today that regulations should not be placed as to obtaining ballot status, but I say it must be minimum.

Q You thought 1 percent was all right?

A I say this: That -- and I want to be perfectly clear on it -- I am not saying that this case requires this Court to say 1 percent is constitutional. I ask only that this Court say an increase beyond 1 percent, in view of the history, was unconstitutional. One day someone may be able to present a case, a litigated case, present a record to a court which would lead us to hold that the 1 percent is unconstitutional.

I am not asking today for less than that 1 percent.

Q How does this requirement compare to the requirements of other states as to independent candidates and to new parties?

A Very, very high. You will remember in the footnote 9 in Williams vs. Rhodes, the Court noted that 42 other states require 1 percent for third party ---

Q Yes, I know, but that is a different situation, isn't it?

A Yes, sir. But if they are only going to require parties to require 1 percent and the party is a structure or an organization to obtain valid status, how much harder is it to require 7 percent from an independent candidate?

The other states in our research are much lower.

Q Is that material in your brief?

A No, sir, it is not. I believe that we got into that question in the Socialist Labor Party brief. I am going by memory on that.

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

Mr. Macklin?

ARGUMENT OF ROBERT D. MACKLIN

ON BEHALF OF APPELLEE

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

First of all, I would like to point out that the appellees in this case have suggested the element of mootness in this case and, of course, that is now pending for your decision. We feel very strongly, however, that in the event -- in the unhappy event this Court might want to rule upon the constitutionality of our election statute, which is under consideration here, we do recognize the fact that when the Court rules, it affects whatever piece of legislation may then be in effect and, consequently, we feel it would have an effect upon our 4 percent statute which is going to be effective some eight days from today on October 30th.

Notwithstanding we would like to ask for some sober reflection on the basic law of this particular case. The appellant initially came into the Trial Court seeking the extraordinary

remedy of a writ of mandamus to co-mand the respondent Board of Elections and certain state officials to place his name on the ballot as an independent candidate for election to Congress as United States Representative from the 21th District in Ohio.

Mr. Brockington had failed at that time to comply with the existing statute requiring that he file nominating petitions signed by not less than 7 percent of the number of electors who had voted for Governor in the next preceding general election in that district. He had filed petitions which were slightly in excess of the 1 percent, which would have been the requirement under the former statute which preceded the 7 percent statute.

Now in Ohio by statutory definition a writ of mandamus commands the performance of an act which the law specially enjoins as a duty resulting from the office of trust or station. In addition, our state law places a burden on the relator to establish a clear legal right to have the writ issued.

So implicit in Mr. Brockington's suit was the requirement that he show the unconstitutionality of the 7 percent statute such that the Court would be correct in reinstating the 1 percent statute and, therefore, granting the writ of mandamus.

Now the record will show that at the Trial Court level there was no evidence introduced supporting a contention of unconstitutionality of the 7 percent statute. The essence of the evidence was simply that Mr. Brockington had filed petitions with signatures consisting of about 1 percent rather than the

requisite 7 percent, and that the respondent Board of Elections has denied certification because of the insufficiency of petition.

Nothing more. This was the entire thrust of the evidence which was heard at the Trial Court in Cuyahoga County in Ohio. It was at that time, and for all I know it still is, the rule in Ohio that an act of the General Assembly is presumed to be constitutional and before a court may declare it unconstitutional, it must appear beyond a reasonable doubt that legislation and the constitutional provisions are clearly incompatible.

Absent an appearance of such incompatibility, the evidence of the record of this case, it was not unreasonable that our State Court should find that no substantial constitutional question existed.

And rather than being an opaque determination in the Trial Court, it was quite clear that the relator had not carried the burden of showing that he had a clear legal right to remedy which he asked for.

In Ohio the basic philosophy underlying the enactment of the statute requiring indepedent candidates to support their candidacy with petitions subscribed by a certain percentage of electors, whether it be 1 percent, or 4 percent or 7 percent, is that we feel that for the best exercise of the democratic process and as a matter of principle, that a candidate for any office be required to demonstrate that his is not the frivolous injection of his personality into the publicity of a political

campaign, but rather, in fact, that he is seeking election to that office.

It is not unreasonable that he be required to show some marked demonstration of support from at least a fraction of the electorate within the area from which he seeks election. We believe that such a requirement is necessary to establish a bona fide pin on the part of the candidate. In this respect, we are supported in our belief in the knowledge that some 42 sister states have some form of similar requirement in either greater or lesser degree.

In actual fact, I believe there are 11 other states which now would require a greater degree of percentage than does Ohio in view of its 4 percent statute coming up.

Q Are there any which don't have any requirement?

A There are five states which don't have any requirement at all, Mr. Justice Harlan.

Q Do you remember which ones they are?

A I can tell you, yes. There are no provisions in Hawaii, Delaware, in Florida, Michigan and Mississippi. And that is according to our research.

Q No provisions for independent candidates?

A No provisions for coming up with a requirement of a certain percentage of electors to sign the petitions for nomination, Your Honor.

Q Do they have a provision for independent candidates

in those states?

A Will you please repeat that?

Q Do they have a provision for independent candidates in those states?

A I am quite sure they do, Your Honor, but we only looked at this from the standpoint of whether or not there was a percentage requirement in the course of our research.

Q Is that material in your brief?

A No, it is not, sir.

Q Mr. Macklin, why the change from 1 to 7?

A I don't really know, Your Honor. This was established by the Legislature. I do think that the appellant case indicates a long history of a very comfortable arrangement with the 1 percent requirement. I think it is conjectural. I think that we might very well ask what might the history have been with a 1.5 percent, with a 4 percent, with a 7 percent?

Q I have great difficulty because I would assume in 60 years that the 1 percent would be much more than it was 60 years ago, because I assume the population of Ohio has increased. I assume that.

A Yes, Your Honor.

Q So with the population increase and with more signatures required, why would you raise the percent? That is my problem.

A Well, I can only suggest that this was within the

sole area of the Legislature at that time. However, since they have taken another look at it, they have reduced it to 4 percent and perhaps they have looked at other states and seen what they have, but I think it is purely a matter for the discretion of the Legislature and in this case that is what they did exercise.

Q There is no way to get at what we call the legislative history in that change in 1952 from 1 percent to 7 percent. Are there no committee reports?

A No, Your Honor, there are not. We looked for this. We looked at newspapers and everything else. As you know, the deliberations are not now set out as they were formerly in 1852.

We believe the requirement of showing some bona fide intent on the part of the candidate really to be in the best interest of the voter and quite frankly we believe it to be supportive of the one-man, one-vote principle in that the voter is assured when he casts his vote for a candidate who is qualified, his vote will be an effective expression of a preference for a candidate, and the vote could be undiluted in its relationship to all other votes cast since he will have voted in behalf of the candidate of proven intent.

Now we freely admit thatour statutes do distinguish between the independent candidate and the candidate who is running for a party nomination. As point out previously, I believe, I believe a party candidate is required only to have 100

signatures on his ballot, but we consider that the reason for this decision lies in the difference in the path of the party candidate must follow as opposed to the independent candidate. The party candidate is put to great time, expense; moreover, he lists his principles on the line on the issues which may be before the people at that time, and certainly in Ohio party primary fights are a very difficult time for the candidates.

We feel that to prescribe a parity between an independent and party candidates, in effect, would be discriminatory as to the party candidates in this instance. But this is not really the issue that has been raised in this case, because the appellant certainly in his briefs openly subscribes to the 1 percent requirement and this of itself is a greater demand of the independent than it would be of the party candidate.

His only complaint lies with the degree of the burden that may be cast upon theindependent candidate, and he really fails to tell us what increment beyond 1 percent triggers off the avalanch of unconstitutional invalidity.

He would ask this Court to determine some magic figure of percentage and to impose upon the State of Ohio and quite clearly the other states would be affected by this, this Court's ideas of what thatpolicy might be.

We submit that the appellant has not offered guidlines. There are no clear or valid criteria which have been presented to this Court which might establish a basis for determining some

magic percentage.

Q What is the state interest precisely that you are serving?

A The state interest, Mr. Justice, ---

Q In 4 percent or 1 percent or 7 percent?

A Mr. Justice Harlan, the state interest that we feel is as far as we can say a compelling state interest is simply that we are requiring that an independent candidate show that he has a valid intent to actually run and that he does have the support of at least a fraction of the electorate in furthering his candidacy.

Q Am I wrong in thinking that that was rejected in Williams vs. Rhodes? That state interest? I thought you pitched your argument in Williams and Rhodes on the proposition that you wanted to assure against the proliferation of names on the ballot.

A Well, this would be a part of it.

Q Too many names, and what your adversary says here is that under the history of the operation 1 percent limitation, your experience had only produced a few candidates on the ballot, so that that argument was -- did not tend to show the valid state interest in what Ohio is doing now.

A Well, we didn't particularly feel that Williams vs. Rhodes was applicable to this particular case, Your Honor.

Q No, it is a different case.

A It is a different proposition. Actually there was no consideration of this particular statute in the Williams vs. Rhodes case and we didn't feel that you completely knocked out the electoral machinery yet ---

Q No, no, I didn't ---

A --- when this took place.

Have I answered your question, Mr. Justice Harlan?

Q Well, that is all right.

A To go on, we submit that the determination of requirements to qualify an independent candidate for certification on the ballot ought properly to be left to the discretion of the Legislature with the knowledge of local conditions and special considerations of assessing the validity of candidate intent are really within the sphere of the political range of the state.

For these reasons, we respectfully urge that this Court should affirm the decision of the Ohio Supreme Court.

Thank you very much.

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

Mr. Sheerer, you have four minutes left.

REBUTTAL ARGUMENT OF BENJAMIN SHEERER

ON BEHALF OF APPELLANT

MR. SHEERER: Thank you, Mr. Chief Justice.

If I might make some comments, first of all, on the statements from appellee's counsel. I do not believe that a

candidate for office has to be able to show that he can win. The three-judge Federal Court in the Socialist Labor Party case pointed out that the right of free speech is the right also to be wrong, and we say that anybody that manifests a degree of sincerity about his candidacy is entitled to be on the ballot and it does not matter whether other people might consider their candidacy frivolous or pointless, whatever.

It is part of basic framework of our society that everyone is entitled to suffrage and to offer themselves as a candidate.

Q Well, did I understand you to say before that there is no prohibition against the so-called "sticker" or write-in candidate under the present law?

A That was achieved by the Williams vs. Rhodes case in the three-judge District Court, that is right. I would point out, of course, ---

Q Is this candidate your client, could he be a write-in candidate in any election for any office, is that correct?

A Yes, sir, except if he were running for President he would -- well, now Ohio requires filing of a declaration of intent to serve shortly before. Let me point out that Williams and Rhodes notes that write-in is not comparable to ballot status, that Mr. Justice Douglass, in his concurring opinion, points out that it is a disability. The majority opinion points out that it

cannot be compared and that it is a definite disadvantage to a candidacy.

The reduction to 4 percent in the Ohio Legislature came after this Court noted probable jurisdiction. The only guideline we are advancing here is one that histry has offered. History has pointed out the guideline in this case.

Let me point out also this is not a case where the Legislature has failed to act, as was the case in the reapportionment cases. This is a cases wherethe Legislature has acted twice, in Ohio and against the interests of independent candidates and minority party candidates.

This is a case thatparticularly requires the relief that this Court can give. There are no independents in the Ohio Legislature.

Q It could be argued that this is not necessarily legislation against or hostile to bona fide independent candidates. In my own experience and observation in this state, because that is where I grew up, there are such things as people who pretend to be independent candidates, but what they are really looking for is personal advertising and aggrandisement. And they are not bona fide candidates.

And if the ballot were filled up with people like that so-called "bedsheet ballot" of the kind they used to have in Detroit, Michigan, it makes it more difficult for a true bona fide independent candidate for public office to command

the attention of the conscientious and responsible voters. Isn't that true?

A That could be true, Your Honor. In Williams and Rhodes the Court spoke of that as a remote danger. Nothing indicates that it does exist.

And they cited the Mineworkers case from Illinois, which says that these rights cannot be infringed on a speculative danger. I think that the intelligence of the Legislature is equal to that sort of problem if it became a problem.

There is no indication whatsoever that it was or will become a problem. And I would hate to defy bona fide candidates before the Court. I think that it probably, the tack the Court should take is one noted in Williams vs. Rhodes. Parties have to begin and people have to begin somewhere. They should be allowed a free and equal chance to engage in the competition of our electoral process.

Q Would you agree, counsel, that the excessively long ballots, sometimes called the "bedsheet ballot," have a tendency to discourage people from voting? Would you accept that as a fact of life?

A I don't know enough about human nature, Your Honor, but I suppose that it might discourage some people.

Q It is widely thought by political scientists and other expert observers that that is so. Now assume for a moment that that is correct. Do you say that the State of Ohio does not

have a balloting interest in preventing that situation from proliferating and expanding?

A Certainly if there were a showing, Your Honor, that this was happening, that people were being discouraged from voting or confused or something like that, the situation would be entirely different.

Q Who must make that showing, the Legislature when it affixes a 4 percent or a 3 or 5 or a 1 percent?

A That's right, Your Honor, because the holding of this Court is that where fundamental liberties are involved, the inquiry will be made as to what interests the state is protecting. This Court is the defender of individuals, minority rights, and it looks when these peoples' rights are burdened or restricted, it looks to theinterests ---

Q You said, in effect, that 1 percent is not unconstitutionally burdensome, but that 4 percent is. In effect, you are saying that the judgment of the Legislature of Ohio is an erroneous judgment by that difference?

A Yes, sir, it is.

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

The case is submitted.

(Whereupon, at 11:56 a.m. the argument in the above-entitled matter was concluded.)