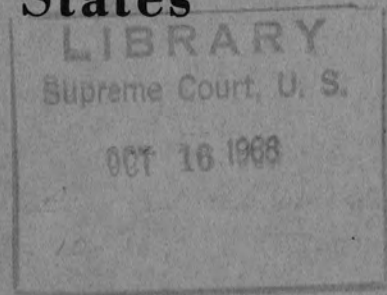


Supreme Court of the United States



In the Matter of:

Docket No. 543

Glen A. Williams, et al.,
Appellants,

vs.

Hon. James A. Rhodes, et al.,
Appellees.

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Place Washington, D. C.

Date October 7, 1968

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

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 4 Glen A. Williams, et al., :
 5 Appellants, :
 6 v. : No. 543
 7 Hon. James A. Rhodes, et al., :
 8 Appellees. :
 9 - - - - -X

10 Washington, D. C.
11 Monday, October 7, 1968

12 The above-entitled matter came on for argument at
13 10:40 a.m.

14 BEFORE:

15 EARL WARREN, Chief Justice
 16 HUGO L. BLACK, Associate Justice
 17 WILLIAM O. DOUGLAS, Associate Justice
 18 JOHN M. HARLAN, Associate Justice
 19 WILLIAM J. BRENNAN, JR., Associate Justice
 20 POTTER STEWART, Associate Justice
 21 BYRON R. WHITE, Associate Justice
 22 ABE FORTAS, Associate Justice
 23 THURGOOD MARSHALL, Associate Justice

24 APPEARANCES:

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STAN SYKES, Esq., Associate Counsel

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8 Columbus, Ohio

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10 1659 North High Street
11 Columbus, Ohio

12 oOo

1 P R O C E E D I N G S

2 THE CLERK: Counsel are present.

3 MR. CHIEF JUSTICE WARREN: No. 543, Glen A. Williams,
4 et al., Appellants, versus Honorable James A. Rhodes, et al.,
5 Appellees.

6 Mr. Young, you may proceed with your argument.

7 ORAL ARGUMENT OF DAVID J. YOUNG, ESQ.

8 ON BEHALF OF APPELLANTS

9 MR. YOUNG: Mr. Chief Justice, members of the Court,
10 may it please the Court:

11 At the outset, I would like to introduce Mr. Stan
12 Sykes, an attorney admitted to the bar of Alabama, who is
13 associated with me in this case.

14 MR. CHIEF JUSTICE WARREN: Very well, Mr. Sykes.

15 MR. YOUNG: First of all, appellants would like to
16 express their appreciation to the Court for the dispatch and
17 vigilance with which they have scheduled this case, a case that
18 may very well need additional remedial relief to protect the
19 most basic of all our rights in society, the right to vote.

20 We recognize that this has been an inconvenience to
21 the Court, but we are grateful that you have scheduled the
22 case so expeditiously.

23 We place this case before the Court in an urgent
24 fashion because we believe that the integrity of the 1968
25 presidential election is at stake.

1 We believe that the transcript evidence before the
2 Court amply demonstrates that plaintiffs' candidate, Governor
3 Wallace, has sufficient voter support in Ohio that his chances
4 of carrying that state are very substantial.

5 The transcript evidence shows polls that were taken,
6 and they were placed before the lower court, and each of the
7 answers to those polls was prefaced on the condition, if
8 Governor Wallace's name appears on the ballot, they would vote
9 for him.

10 On the other hand, it would appear to us from the
11 evidence of the transcript that if the plaintiffs in this
12 case are relegated to the Federal Court relief of write-in
13 status, if Governor Wallace's name is taken off the ballot in
14 Ohio, that his supporters in that state might as well forget
15 about those 26 electoral votes.

16 Thus we appear before the Court today seeking relief
17 that not only is essential to the protection of the equal
18 protection of the law and rights of the voters of Ohio, of the
19 candidates, of the minority political parties, but also pro-
20 tection of the integrity of this presidential election, and
21 an order which will convince at least 452,000 voters in Ohio
22 that they cannot be fenced out of the democratic electoral
23 process simply because their views do not agree with the views
24 of the majority party.

25 Q Has there been any challenge at any stage of

1 those 452,000 signatures?

2 A There have not. We tendered them to the
3 election officials. They did not care to review them. At the
4 time they were placed before the District Court, the lower
5 District Court, they were placed before them, as the transcript
6 indicates, by a certified public accountant.

7 Now, of course, he would not have verified some of
8 the things he could not verify. The petitions that were before
9 the lower court are not required by Ohio law to be registered
10 voters. Therefore, the only verification that would be neces-
11 sary would be the age and the residence in the State of Ohio.
12 The duplications were culled out.

13 Q The write-in, I gather, was only of the candidate's
14 name, is it?

15 A That is correct.

16 Q How did this affect, or accomplish, a vote for the
17 electors?

18 A Under Ohio law, we have an Ohio statute, and we have
19 had for many years, that states that a vote for a presidential
20 candidate whose name appears on the ballot is considered as a
21 vote for the electors pledged to him certified to the Secretary
22 of State.

23 The order of the lower court provided that in order
24 for a write-in vote for a presidential candidate --

25 Q And they have been certified?

1 A No, we have in this case until October 15th to
2 accomplish that certification.

3 Q In your scheme of things, I take it the write-in
4 doesn't satisfy any right by itself, but I take it you ask
5 for it separately?

6 A We did not.

7 Q What is your position, that the state could constitu-
8 tionally dispense with the write-in?

9 A No, I do think that the write-in does protect certain
10 fundamental constitutional rights.

11 Q But not by itself?

12 A Not in and of itself, no. Perhaps I might get ahead
13 of myself and explain why.

14 I think that a very significant aspect of the
15 inadequacy of the relief order by the lower court in this case
16 is demonstrated when one reviews the election laws in Ohio and
17 their relationship to the methods of write-in voting.

18 In Ohio, we have in excess of 13,000 precincts with
19 polling places. The elections as such are governed by 88
20 counties in the state. Each clerk of the board of elections,
21 then, and that board of elections selects the voting method
22 that he feels would best suit his county's conditions.

23 Now, the problem is that there are five different
24 voting methods scattered throughout the State of Ohio in these
25 88 counties, and 13,000 precincts. I will review them real

1 quickly.

2 First of all, the basic paper ballot, and of course
3 the difficulties of a state-wide write-in campaign aren't too
4 great with that ballot, and it has an extra space, and rather
5 than checking the space with the name on it, one writes in the
6 name in the extra space and checks it.

7 Moving from there, we move to what we call the
8 sensitized paper ballot, used in Hamilton County, the third
9 largest county, with the City of Cincinnati.

10 They use the sensitized ballot. It is a punch card
11 that has four holes on the corners of that sensitized ballot.
12 In order -- the reason they have those is that these are
13 counted in the Secretary of State's office. They are trans-
14 ported to the office, put on a machine, and they push a button
15 and they go through the machine and the sensitized votes are
16 recorded.

17 When a voter in Ohio approaches the booth to use that
18 kind of device, he would be given a cigar-lighter type of
19 device with which he would stamp his choice, and the stamp
20 makes a recording in this machine.

21 If he wanted to write in, he couldn't use this
22 apparatus. It writes too large. There would be pencils avail-
23 able, and if he picked up the pencil first and started to write
24 in, there is no written instruction in the booths or on the
25 card to show that the pencil would not record any of the votes

1 for all the other candidates.

2 So he couldn't use the cigar-lighter kind of
3 apparatus to write in. He couldn't use the pencil to mark the
4 other ones. The only way a voter in Ohio in this election
5 would know what to do would have to be to ask the voting
6 officials, so this is going -- and then, of course, they will
7 have to cull out all of these sensitized cards with any writing
8 on them and count them twice.

9 From those two methods, we move to the three-voting-
10 machine method. The first one, the record demonstrates the
11 Shoup method which probably is the easier to use in write-in
12 situations. It is the voting machine that has the offices
13 listed vertically and to the left, and then the candidates to
14 the right.

15 It is quite simple to use the write-in process in
16 those, because the little door that you lift up to find the
17 paper certificate just to the left of the office, and so you
18 go over there and write in.

19 But the more frequently used automatic voting machine
20 has its candidates almost horizontally across the top, and it
21 has a little box some place else where you have to lift up
22 doors to find the place to vote.

23 You have to correlate a number that is attributed to
24 a specific office, and go up some place else on the machine and
25 lift up the door that relates to that number and then write in

1 your vote.

2 For this particular year, there is a major problem.
3 The little slants where you write in slant this direction for
4 a right-hand voter, and a left-hand voter would almost have to
5 get up and stand on his head to write in that space.

6 Q We are dealing here only with the offices of Vice-
7 President and President of the United States, essentially with
8 the election of the electors, not with senatorial or congress-
9 sional elections.

10 A Not in this case.

11 The final voting apparatus that I would discuss is
12 the coil voting machine. This will present problems, also,
13 because it has -- it is really a tabulating machine, as the
14 record shows. A voter picks up an IBM card, and this is later
15 counted by an IBM machine, and he puts the IBM card into this
16 marking apparatus, a glass plate fits over it, and it magnifies
17 the mark, on this ballot, and you go in and turn the card
18 around and when you get to the office you want to vote for, you
19 punch it, and it makes a mark on the ballot.

20 In order to write in, you have to get the card out of
21 the machine. This would be simple to a lot of people, but I
22 think a lot of people would not realize how they are going to
23 write with that card instead of the magnified apparatus.

24 Q Where is that used, in Butler County?

25 A Yes, and I think down south, in one of the other

1 counties of Ohio.

2 I think that an explanation of these five different
3 kinds of voting devices suggests the utter frustration of try-
4 ing to mount a state-wide voter education campaign, of how are
5 you going to go in and exercise the write-in right to vote.

6 It would be extremely difficult for some people even
7 to accomplish it, and many voters, with many of the apparatuses
8 would have to discuss this with the voting officials, and
9 reveal in essence who they are seeking to vote for when they
10 are trying to determine how to use this write-in device on
11 these machines.

12 The record before the Court indicates that Governox
13 Wallace supporters have obtained ballot positions for him in
14 all 49 states. He has been certified in 49 states now, and
15 of course if we include the temporary order, this would be 50
16 states, but for this litigation, and this is why it was
17 brought; this year in the presidential election Ohio would have
18 been shamefully alone as the only state in the country denying
19 ballot positions to a presidential candidate who could demon-
20 strate sufficient voter support to satisfy any reasonable
21 voting qualification, or candidate qualification requirement
22 established by any state.

23 We have demonstrated to the Court, we hope, that Ohio's
24 election laws are more harsh and more discriminatory as they
25 relate to the independent and third-party candidate voters than

1 any other state in the country.

2 Mr. Sykes was doing some computations for me. When
3 we looked through the voting laws in all 47 states where some
4 form of a signature petition was used -- there were three
5 states: one of them, a convention was used; Alabama a primary,
6 and another state that it was an existing party that certified.

7 But in 47 states where signature petitions were
8 used, the total requirements, and this included Ohio, was
9 1,052,867. When you subtract Ohio's requirement from this,
10 433,100, it takes 619,000 signatures, using our methods, to get
11 on the ballot in 46 states, and 433,100 -- pretty close to that
12 figure -- just to get on the ballot in the State of Ohio, and
13 after you get the signatures before the Secretary of State, you
14 can't get on the ballot, and we hope to illustrate that later
15 on.

16 Just the 15 per cent requirement is 75 percent higher
17 than the percentage requirement in New York, 30 times higher
18 than the ballot position requirements in each of the average of
19 the five states bordering on the State of Ohio.

20 Q Don't you have to win this point to win your case?

21 A Which point is that?

22 Q The unconstitutionality of this 15 percent.

23 A It would be helpful, but it seems to me that even if
24 the 15 percent requirement were held to be constitutional, there
25 are several other aspects of Ohio's voting laws which would

1 demonstrate their violation of the protection of the equal
2 protection clause.

3 Q Let's assume those others were bad.

4 A Assume they were not?

5 Q Assume they were bad, the other aspects of it. That
6 would still leave the 15 percent.

7 A Unfortunately, once you get the 15 percent, you are
8 nowhere in the State of Ohio.

9 Q I know, but you didn't get the 15 percent in time.

10 A It depends what you mean by "on time."

11 Q You seem to say as I read your brief that 15 percent
12 would have to be in before the primary.

13 A There is no statute in the State of Ohio that requires
14 the 15 percent to be in at any time other than 90 days before an
15 election.

16 Q That is right. Did I read you incorrectly? I
17 thought you agreed that that was a proper interpretation.

18 A Yes, but perhaps I should explain why. The argument
19 is, properly so, that in order to get on the ballot as a
20 presidential candidate, you would have to have delegates to a
21 national convention for the primary --

22 Q I understand that, but let's assume that all the
23 other provisions about a third party were unconstitutional, and
24 Ohio came back and said, "Well, we concede these other provis-
25 ions are unconstitutional, but the 15 percent requirement before

1 the primary is wholly legal, and this party didn't satisfy
2 that, and so no relief."

3 A I wouldn't agree, because I think here the mere
4 detail -- the first attempt was an independent nominating
5 petition. The mere fact that that was denied was taken away
6 from the voters of the State of Ohio in 1948. That, in and of
7 itself, would allow relief in this case.

8 Q Then you have to get to that, though, don't you?
9 If the Court said that state was entitled to force candidates
10 to go through a party process, then you would have to win on
11 the 15 percent.

12 A Yes, if they said that we must go through a political
13 party process, then we would have to show that the 15 percent
14 is unconstitutional. I am satisfied that we could show that to
15 this Court.

16 Q Your arithmetic, in the arithmetic of it, you have
17 your 15 percent, haven't you? It is just the question of
18 timeliness?

19 A That is correct. We do not suggest to the Court,
20 however, that because we could get the 15 percent that it is
21 not an overwhelmingly prohibitive requirement. It must have
22 some relationship to a permissible state policy.

23 Q I understand you have got it arithmetically, and the
24 validity of the signatures is not challenged, I suppose. As
25 far as arithmetic is concerned, it is not very important to

1 you. It is the timing.

2 A Yes, although we would hope to convince the Court
3 that the timing is not the significant factor. No matter
4 when, if we had filed those petitions five years before this
5 election, we still couldn't have gotten on the ballot, because
6 there are so many other pitfalls for the new party that that
7 15 percent wouldn't have done us any good. We still couldn't
8 have got on the ballot.

9 Q That is based on these other provisions --

10 A That is correct. The 15 percent is only significant
11 insofar as it relates to those other provisions. If those
12 other provisions didn't exist, we wouldn't have to worry about
13 it.

14 Q You would have had to worry. Let us assume, if Ohio
15 said these other provisions are wholly unreasonable, and we
16 won't apply them to you, but you still have to get your petition
17 in before the primary, you wouldn't have satisfied it.

18 A I am not making myself clear, Justice White. The law
19 says it must be in 90 days before the election. If you knocked
20 out those other laws, there would be no requirement that it be
21 in on February 2nd. August 7th would be perfectly satisfactory.
22 There is no statute in the State of Ohio that requires the 15
23 percent to be in 90 days before the primary. That only comes
24 about if you uphold the other party primary provisions which
25 would be prohibitive against this party.

1 If you threw those statutes out, the 15 percent 90
2 days before the general election would be satisfactory under
3 Ohio law. I know it is very complicated, but this comes about
4 by an interrelated reading of this statute with the political
5 primary statutes. It is only by inference from the primary
6 statute that we get this necessity of filing 90 days before the
7 primary.

8 One could read the laws, I suggest, the average
9 lawyer, for 50 hours, and he would never realize that that
10 petition had to be in 90 days before the primary, because,
11 unless you understand every single election statute, you don't
12 get to that result.

13 Q But you do concede, Mr. Young, do you not, that
14 because of the interrelationship and interoperation of the
15 various Ohio election statutes, the word "elections" does mean
16 primary elections under Ohio law, don't you? You are not
17 attacking this as being unconstitutionally vague or anything
18 like that, are you?

19 A No. It would mean election in some instances. Let's
20 say we were not attempting to qualify a presidential candidate
21 or some other kind of candidate. Then that word "election"
22 would not mean primary. It could mean general election, it
23 could mean primary, it could mean special, depending on what
24 use you were trying to make of the 15 percent requirement.

25 Q In this case, under the requirements of the Ohio

1 statutes, you are not questioning that they do require signa-
2 tures to be filed 90 days before the primary election, and that
3 is one of the things you are objecting to?

4 A We concede in this case, in order to get on the
5 ballot, if there weren't all these other unconstitutional pro-
6 visions, we would have to file before February 7th. No ques-
7 tion about that.

8 The State of Ohio in this case, in its brief that is
9 before the Court at the present time, has conceded the motivation,
10 the reason for the adoption of the key statute that we are
11 concerned with in this case.

12 As to the legislation, amendments that occurred back
13 in 1948 to 1952, which completely eliminated the right of
14 nomination of independent candidates, they have stated that an
15 independent candidacy is an evil, and they, because people end
16 up voting for someone they really shouldn't vote for, and these
17 statutes in 1948 to 1952 were designed to stamp out that evil,
18 to wit, independent candidacies.

19 As to the independent party laws, the State of Ohio
20 states that it is a legitimate purpose to prevent third-party
21 candidates or third parties from interfering with the chances
22 of the two major party candidates to get a clearcut victory in
23 an election.

24 We concede those motivations also, and we do not
25 believe they withstand the requirements of the Fourteenth

1 amendment. We do not believe that these are legitimate or
2 permissible state policies.

3 Q Mr. Young, we are dealing here, of course, with a
4 constitutional issue, and I would suppose you would agree that
5 one wouldn't begin with the Fourteenth Amendment in this case,
6 but rather one would begin at least with Section 1 or Article
7 II of the Constitution.

8 A Yes, that is where I started out.

9 Q And with the Twelfth Amendment?

10 A Yes, Justice Stewart.

11 Q What does --

12 A When I read that section of the United States
13 Constitution, I note that it provides that a state may appoint
14 a --

15 Q Shall appoint. "Each state shall appoint."

16 A That is correct, "shall appoint" its presidential
17 electors. Our constitutional history tells us that subsequent
18 to about the 1870's, that no state has appointed its presiden-
19 tial electors by the legislative body doing so, but rather,
20 they have appointed their presidential electors by either -- by
21 one form or another of letting the electorate vote for them.

22 So when I read that section, I do note that the state
23 could appoint, but when I read it in conjunction with what this
24 Supreme Court has stated, for example, in the Harper case, that
25 once a state exercises a constitutional power by delegating

1 that to the voters in the state, that that delegation must
2 comply with the requirements of the Fourteenth Amendment of the
3 Constitution of the United States.

4 Q The constitutional provision that you and I are now
5 talking about goes on and says, "Each state shall appoint in
6 such manner as the legislature thereof may direct a number of
7 electors."

8 You would concede, I suppose, that a state today
9 could constitutionally provide by legislature that its electors
10 be named by the state legislature, would you?

11 A Probably so, but as I read this Court's decisions, I
12 am not a hundred percent sure.

13 Q We deal here with a written Constitution, and in this
14 respect the Constitution is very explicit. It says, "Each state
15 shall appoint in such manner as the legislature thereof shall
16 direct a number of electors."

17 We certainly must begin with that -- shouldn't we? --
18 on the deliberation of the issues before us in this case.

19 A That is correct. I did not include it in my reply
20 brief, but on the day I had to file it, I called opposing
21 counsel and noted that I should have cited one case which I feel
22 comes closest to that.

23 That is the case of Katzenbach v. Morgan. The Court
24 will well recall this was a New York case where the State of
25 New York was attempting to uphold its literacy requirement as a

1 qualification for voting and as against the Federal legisla-
2 tion, the Voting Rights Act, which stated that if one attended
3 Puerto Rican schools and went to the sixth grade and wasn't
4 taught English, they could not be barred from voting.

5 One argument presented in this case was the fact
6 that the State of New York by reason of direct constitutional
7 grant, United States constitutional grant, had the power to
8 establish qualifications of voters in an election for United
9 States -- members of the United States House of Representatives
10 and United States Senators.

11 In other words, in this instance, the state, like a
12 state would be doing if it were appointing electors, was doing
13 exactly what the United States Constitution told it to do.

14 And I have this real brief little quote here which
15 I think comes close to answering this requirement. It starts
16 out by recognizing under the distribution of powers affected by
17 the Constitution, the states established qualifications for
18 voting for state offices, and qualifications established by the
19 states for voting for members of the most numerous branch of
20 the state legislature also determine who may vote for United
21 States Representatives and Senators, and then cites some
22 authorities.

23 But, of course, the states have no power to grant or
24 withhold the franchise on conditions that are forbidden by the
25 Fourteenth Amendment or any other provision of the Constitution.

1 Such exercises of state power are no more immune to
2 the limitations of the Fourteenth Amendment than any other
3 state action.

4 Now, as I read that, this Court is saying that,
5 regardless of the source, of whether the state is regulating
6 the qualifications simply by reason of the reserve powers in
7 the state constitution, or because of some constitutional grant
8 of authority like they were doing in the Katzenbach case, that
9 still the restraints of the Fourteenth Amendment still apply.

10 Q In the Katzenbach case, first of all, we were dealing
11 I think, with an act of Congress, which we don't have here and,
12 secondly, we are not dealing, I don't think, with this explicit
13 provision of the Constitution, not giving permission to the
14 states, but setting forth specifically how the electors shall
15 be chosen by the states, and they shall be chosen, they shall
16 be appointed as the state legislatures may direct.

17 Those are two very obvious and evident, at first
18 blush, differences between this and the Katzenbach case, I think,
19 or am I mistaken?

20 A Those are differences. I don't see the distinction
21 the same as you do, Justice Stewart, but certainly they are
22 differences.

23 It seems to me the section you are referring to does
24 not go on and say, however, that the state shall appoint in such
25 manner as it shall direct without regard to the protection of

1 such and such and such and such.

2 Q Of course, the protection of such and such and such
3 and such didn't exist when this was written, because they
4 didn't come along until the 1860's, after the Civil War.

5 Certainly before the post-Civil War alterations in
6 the United States Constitution, it would have been clear, would
7 it not, under the second clause, Section 1, Article II of the
8 Constitution, you wouldn't have had any case at all, any case
9 at all, would you, before the Thirteenth, Fourteenth and
10 Fifteenth Amendments?

11 A I don't think we would have.

12 Q So the question is here, really, is it not, how much,
13 if at all, the post-Civil War amendments have modified the
14 explicit provisions of the second clause of Section 1 of
15 Article II?

16 A I am not sure that we would have to say modification,
17 because I don't read that original provision as saying "in
18 such manner as they shall direct, discriminatory or otherwise."
19 No case of this Court has ever held, to my knowledge, that
20 simply because of that provision that once the state went for-
21 ward with their appointment and appointed by way of delegation
22 to the electorate, they could do it in a discriminatory fashion.

23 In McPherson v. Blacker, it seems to me even in that
24 case, and I guess it was after the Fourteenth Amendment--

25 Q 1892.

1 A -- went on and indicated there was no discrimination
2 alleged in that case.

3 Q Do you really want to rest on the argument that you
4 just elaborated, based on Katzenbach v. Morgan? I thought your
5 argument was that if the state chooses in effect to delegate
6 this power to the electorate, it must then do it on the basis
7 which preserves equal protection rights to all voters.

8 A That is to say, once you have taken the step that a
9 state chooses to vest this constitutional authority, which I
10 agree, as my brother, Stewart, does, that once the state
11 chooses to vest that in the voters, it has to provide that the
12 right should be available to be exercised by the voters on the
13 basis of equality.

14 A That is precisely our position. If I by any other
15 answer suggested it was otherwise, I hope you will disregard
16 it. That is precisely our position in this case.

17 Q We were kind of off in left field, weren't we?

18 Q Right field.

19 (Laughter.)

20 Q Now that you have clarified what your position is,
21 does the legislature say to the voters, "We are going to share
22 this power with you, but you are not going to get it all; we
23 are going to choose and let you choose -- choose between the
24 candidate of the Republican Party and the candidate of the
25 Democratic Party"?

1 A Once we concede that after the state begins delega-
2 ting to the voters, that the Fourteenth Amendment protections
3 apply, then it seems to me that kind of delegation clearly must
4 fall, because there would not be a legitimate and permissible
5 state policy to limit presidential candidates, or presidential
6 electors, only to those who adhere to the beliefs of the
7 Republican or Democratic Parties, so it would be our belief
8 that this should fall.

9 Q Although the legislature could say, it could pass
10 along, that the electors shall be chosen by the legislature of
11 the state, but they shall be chosen as between the electors
12 for the Democratic Party and the Republican Party, and each
13 year, each presidential year, the legislature will choose be-
14 tween the candidates of the two parties?

15 A I feel that would be a blatant violation of the
16 Fourteenth Amendment, just as much as if they said, "You must
17 choose between members of the Jewish and Catholic religious
18 faith."

19 I don't think there is any justifiable permissible
20 basis for establishing such a position, and I think that such
21 a delegation should fall.

22 Q Would there be any restriction at all, Mr. Young?

23 A Any restriction? We do concede, yes, we think that
24 the state, as indicated by this Court in many cases, the
25 Carrington case and others, that the state has performed the

1 historic function of protecting the ballot and protecting the
2 integrity of its elections, and making sure that the citizen's
3 right to vote was meaningful and they had proper methods for
4 voting, accuracy and all the rest.

5 We do feel that a state may place restrictions on all
6 of these items, but that in order to prevail, in order to
7 withstand constitutional challenge, that these must be reason-
8 ably or rationally related to a permissible state purpose.

9 I think that in the case at bar, in the case at bar
10 counsel and the State of Ohio have said what their purpose in
11 one of the statutes is. Their purpose is to stamp out indepen-
12 dent candidacy.

13 The statutes they adopted were rationally related to
14 that first purpose, but it seems to me the second half of the
15 proposition fails, that this purpose is not a permissible state
16 purpose, so that would not, these are not --

17 Q Not permissible? Well, when you say not permissible,
18 it is not for us, of course, to judge the wisdom, or the
19 policy, or the good sense of the Ohio Legislature, but simply
20 whether or not its action is constitutional, and it is not
21 permissible under what provision of the Constitution?

22 A The Fourteenth Amendment of the United States
23 Constitution.

24 Q Which part of the Fourteenth Amendment?

25 A That which demands equal protection of the laws.

1 Q Do you think the due process clause of the Fourteenth
2 Amendment has anything to do with this case?

3 A As I have framed the case, I have placed it on the
4 equal protection clause.

5 Q Your brief says that.

6 A I have not come up with a theory that would put it
7 in the due process category. It seemed to us that the equal
8 protection clause was so applicable here.

9 Q You don't rely on the First Amendment?

10 A The first amendment is significant. It is not as
11 significant to the ballot position, but it is significant in
12 this whole area because of the free speech right, and it seems
13 to us any legislation that prevents organization and free
14 participation of minority parties in the political spectrum in
15 a state can, if those regulations are not reasonably related
16 to a permissible state policy, and it isn't permissible just to
17 discriminate against them -- it has to have some other reason--
18 that in that instance, if if denied participation, as our laws
19 do in Ohio, then it seems to me that we are impairing free
20 speech rights, too.

21 Q I thought the right to organize for political purposes
22 was of the essence of the First Amendment, the essence of the
23 thing you are talking about here.

24 A So do we, and that is why we face the right to
25 organize.

1 It would seem to us that the First Amendment brought
2 in through the Fourteenth --

3 Q Through what clause of the First Amendment?

4 A The due process, which gives us the right to organize,
5 but we want to go further than just organize, and just partici-
6 pate. It seems to me that what we really need in this instance
7 is ballot position, and the reason we aren't getting ballot
8 position is because of the laws that are discriminatory, and do
9 not provide equal protection of the laws, and certainly this
10 analysis we could have placed more emphasis on, on the due process
11 clause.

12 Q Mr. Young, assuming the unconstitutionality of the
13 Ohio statute, for whatever reason, the question of relief here,
14 I suppose, is clearly and obviously an important one.

15 Are you familiar in a general way with the Socialist
16 Labor Party's petition before us?

17 A Yes, Mr. Justice.

18 Q Would you say that there is any distinction between
19 the relief that should be granted in those two cases, assuming
20 the unconstitutionality of the Ohio statute, and also assuming
21 the facts of life with which we are confronted?

22 A Yes. I do see a very substantial distinction.

23 When I explain it, I want to make it perfectly clear
24 that we have no objection to the Socialist Labor Party appearing
25 on the ballot.

1 Q I am trying to get at the theory, and it seems to me
2 this would be the quickest way to do it.

3 A Once we start out with the proposition -- recognizing
4 because of the state's historic function, and holding to its
5 procedures, that it can come up with some reasonable regulation
6 related to a legitimate policy -- it seems to us if we accept
7 that proposition that the state could establish some reasonable
8 requirements preliminary to obtaining ballot position. Practi-
9 cally every state in the country does this.

10 Now, if it is a number requirement, it has to be the
11 size of the -- the number has to be carefully scrutinized to
12 make certain that the trup purpose and effect isn't just
13 discrimination rather than making certain that we don't have --
14 we couldn't let every citizen have his name on the ballot.

15 Q I understand that, but we are faced with a practical
16 situation here, and I notice, I might say with surprise, that
17 in your paper you ask us to direct the Ohio Legislature to
18 formulate some sort of requirements that would be lawful and
19 constitutional.

20 Do you really mean that, that the Court should
21 direct the Ohio Legislature to do that? I believe that appears
22 in your reply brief.

23 Is that the way you would, as a practical man, make
24 a distinction between your case and the Socialist Labor Party
25 case?

1 A Perhaps the way you asked the question, I would
2 direct them that if there are to be requirements, that they are
3 reasonable requirements.

4 Q That is not what I am asking you. You can phrase it
5 any way you want to.

6 A Yes, I do phrase it that way.

7 Q I am asking you how you go about making a distinction
8 between those.

9 Let's assume that the Socialist Labor Party has 200
10 members all told. Something like that has been suggested in
11 the papers, and you have got all these members, hundreds of
12 thousands of them.

13 As a matter of constitutional theory, and the function
14 of this Court, could you make a distinction and, if so, how, or
15 what is it that you are asking us merely to say to Ohio, that
16 its statute is unconstitutional because it is discriminatory
17 against so-called independent parties and independent candidates,
18 and therefore it must grant relief, and the relief order is not
19 the relief order to be ordered by this Court, which is a write-
20 in, but that the names of both parties must be printed on the
21 ballot?

22 A It seems to us that when one brings a case like this
23 before the Court, he must meet two objectives: First of all,
24 to demonstrate the unconstitutionality of the legislation that
25 is being challenged and, second, demonstrate by the principles

1 of equity that the court should grant equitable relief.

2 Now, if a party came before the three-judge District
3 Court in Ohio and said, "We have one member, and we don't want
4 any more," and another came in with 450,000 signatures on a
5 petition, it seems to us that the Court could make a distinction
6 on this ground, as Judge Kinneary did in this case.

7 His distinction was that this party has demonstrated
8 that it has sufficient voter strength to meet any constitution-
9 ally-permissible number. He did not find that the other cases
10 demonstrated that it could meet constitutionally-permissible
11 standards. Then a court of equity must decide on the one-man
12 party and the 350,000 -- is the state law that kept this one-
13 man party off the ballot, or is it just the mere fact that they
14 aren't large enough to be on the ballot?

15 It seems to me that once you concede reasonable
16 numbers regulations, then it seems to me that you get into the
17 case where the plaintiff is coming into court and asking
18 equitable relief, that a judge will look on their strength and
19 see whether the laws themselves would keep the party off the
20 ballot.

21 Q In effect, you think the Court should make a judgment
22 as to whether the number of signatures on your petition is
23 appropriate for equitable relief?

24 A That is something that this Court would consider, I
25 assume, and whether the facts indicate that they have shown to

1 the court that equitable relief is appropriate. I think
2 numbers is probably one of the biggest factors in this case,
3 450,000 signatures.

4 Q You don't press your suggestion that we direct the
5 Ohio Legislature, that this Court direct the Ohio Legislature
6 to enact an appropriate and constitutional law?

7 A I have no misgivings about this Court directing the
8 Ohio General Assembly to adhere to the United States
9 Constitution in this case any more than in the redistricting
10 cases, the malapportionment cases, or in the --

11 Q You think that we have that power, and could
12 properly execute the power to direct the Ohio Legislature to
13 do that?

14 A I have no quarrel with that proposition.

15 Q It is not my proposition; it is yours.

16 A If it is mine, then I champion it.

17 Q Mr. Young, can you suggest any occasion when this
18 Court has ever directed a legislature to adopt a particular
19 kind of law?

20 A Well, in effect, it seems to me that the apportion-
21 ment cases, this court, or upon remand to the lower courts, the
22 courts have said that no election may go forward until you
23 reapportion your areas.

24 Some elections have been voided by Federal court
25 cases, and set aside, because there was not proper apportionment.

1 Q That is all that has been done, that is, set aside as
2 not properly apportioned, and you suggest if it is not done by
3 the state then the Court might set up that?

4 A That is exactly what I am saying. I am not playing
5 upon how this Court or any other Federal court causes a parti-
6 cular state legislature to accomplish this.

7 It seems to me that if this Court were to say to the
8 Ohio General Assembly that, "Unless you revise your laws to
9 permit reasonable participation by independent third-party
10 candidates, that there can be no elections under those laws."

11 This, in effect, is directing the State of Ohio to
12 revise its laws. This is really what I am saying, and perhaps
13 I should have given that answer to Justice Fortas. It seems
14 to me this is just as much direction as any other form of
15 direction, and with the Ohio Legislative Service Commission,
16 these were laws that were adopted back in 1948.

17 There is no question in my mind right now that on
18 proper order, the Ohio General Assembly would be delighted to
19 bring the laws up to date like the laws of other states.

20 Q The statute is 20 years old. It could have been
21 attacked before July 29th of this year.

22 A Not by our offer, your Honor. We, our law firm, were
23 retained July 23, 1968.

24 Q I am not talking about your being retained. I am
25 talking about the people you represent.

1 A This puts them in a rather funny position. We were
2 in the lower court. We had two situations. We had two cases.

3 One group of plaintiffs attacked the law right away,
4 back in January of 1968, without trying to get petitions, and
5 they were met with the argument, "Hey, you should have gone out
6 and tried to get petitions before you came into court."

7 Then on the other hand, we got the petitions and came
8 into court, and they said, "You should have filed your lawsuit
9 earlier."

10 So no matter which way we went, the State of Ohio --

11 Q When did the State of Ohio say that to you? Was
12 there a lawsuit filed?

13 A We have two lawsuits, the Socialist Labor and the
14 Wallace case. The Socialist Labor was filed in January of
15 1968, and ours was filed on July 29, 1968. We have the two
16 ex periences of one situation of a lawsuit having been filed
17 early, and one on July 29th, so it seems to us that there was
18 certainly adequate notice and time to defend this case.

19 Q Mr. Young, you said that the legislature would
20 welcome an opportunity to take another look at the 1948 statute.
21 Why can't you file in the state court to give them that oppor-
22 tunity?

23 A When the time for filing this lawsuit came about, the
24 Ohio Supreme Court was not in session. It has been my personal
25 experience that they are not able to get back as quickly as has

1 been accomplished in this case. We feared --

2 Q They were in session in February, weren't they, I
3 assume?

4 A In February the plaintiffs in this case were attempt-
5 ing to comply as substantially as possible with the Ohio laws.

6 Q Do they have declaratory judgments in the Ohio state
7 courts?

8 A We certainly do, but in this case, in February of
9 1968, the plaintiffs were operating under the assumption that
10 if they proceeded forward and obtained 15 percent signatures
11 that they would get ballot position for their candidates.

12 Q It was a wrong assumption --

13 A If I were in the case then, I might have advised
14 them a little differently, but at that time there is no ques-
15 tion in the world but what they were doing was proceeding on
16 the assumption that they could meet Ohio law.

17 Ohio law, when we say it is a wrong assumption, Ohio
18 has the most confusing set of election laws. It is utterly
19 impossible.

20 Q Isn't that what lawyers are for, to confuse the
21 statutes?

22 A Sometimes the legislatures win. In this case they
23 did, over some.

24 Q Did your clients make any effort to comply with the
25 law other than to go out and get signatures?

1 A Yes. There are two early requirements to get ballot
2 position in a case like this if one uses the new political
3 party techniques.

4 One of them, one has to file a subversive kind of
5 affidavit, and then there is an investigation, and hearings to
6 make sure that these people are nonsubversives, and this was
7 done in this case. The material was presented to the Secretary
8 of State back in -- I think it was May -- and the Secretary of
9 State conducted an investigation and certified this new politi-
10 cal party pursuant to that provision of the law.

11 Q What about the other provision for qualification,
12 such as the hierarchy of the party in the state? Did you under-
13 take to fulfill that obligation?

14 A The petition that was prepared for circulation in this
15 case did make provisions for the calling of a state convention,
16 and holding of a national convention.

17 By the same token, it gave alternatives, the possi-
18 bility of delegating the power to call the state convention to
19 three people named in the petition, as distinguished from
20 first electing a county chairman in all of the counties
21 throughout the sttite and having them the party functionaries
22 The petitioners delegated the right to call such a convention
23 to the three people named in the petition.

24 Q Was there any question as to whether that conforms
25 to state law?

1 A Yes. The Secretary of State would not accept that.
2 In his letter -- by the middle of July of this year, the
3 petitioners in this case had somewhere between 300 and 350
4 thousand signatures, and it appeared quite clear to them that
5 they would have no difficulty getting in excess of 433,000.

6 At that time, a request was made to the Secretary of
7 State of Ohio that if we meet this signature requirement, we
8 will be placed on the ballot.

9 One of the things he noted was that this new party
10 could not call a state convention which would select electors,
11 and the reason he said that they couldn't call a state conven-
12 tion is because the Ohio statutes require existing office
13 holders and attendees at the convention who are apportioned
14 based on this party's vote at the last election, and this is
15 what the Ohio laws provide, so you see, he was saying that,
16 "You haven't had and you aren't going to have a convention,
17 and you don't have people who can attend a convention, and
18 therefore you cannot certify electors to me."

19 This is one of the reasons provided by the Secretary
20 of State for refusing, and so he took the position that our
21 form of holding a convention would not satisfy Ohio law.

22 Q I was wondering why you couldn't have gone into court
23 prior to the 29th of July to have these matters determined so
24 that the state would have ample time to either conform to its
25 election laws, or to change them.

1 A First of all, it seems to me that we did not have in
2 this case a question of interpretation of state laws. Once you
3 understand them, they do bar ballot position. Then it seems
4 to me that plaintiffs have a decision of whether to seek relief
5 in the Federal or in the state court.

6 Quite frankly, I would have advised at any given
7 time to have filed a lawsuit such as this before a three-judge
8 Federal court, which has been a traditional forum in these
9 kinds of cases, and since we don't have an interpretation of
10 state law questions, but merely a constitutional validity of
11 state law, I personally see no objection to the Federal court
12 forum.

13 Q When do you conceive the first available date was open
14 to you for the suit you have here?

15 A I am in somewhat of a difficult position, Justice
16 Warren, because we came into the case July 23rd, and filed it
17 six days later. When could my predecessors have filed it?

18 Q Yes, anybody.

19 A Well, it seems to me that when they first became
20 convinced that regardless of whether they accomplished this
21 petition requirement or not, that they would not get on the
22 ballot. You see, when they first started out, we were organi-
23 zed, this party was organized in January of 1968. It recognized
24 the method of nominating petition had been denied in Ohio.
25 You couldn't get on the ballot by independent nominating

1 petition like in other states.

2 Q At that very point, if you wanted to challenge the
3 state's insistence that you be a party rather than an independ-
4 ent candidate, you could have filed right then. That was
5 perfectly clear that you had to be a party and you couldn't
6 petition yourself onto the ballot. That was clear, wasn't it?

7 A There is no question about it.

8 Q There was also nothing vague about there being no
9 write-in.

10 A There was no question about that.

11 Q Also, there was no question but that what if you were
12 going to be a party, that you had to be a party and that there
13 was no question that you had to get 15 percent.

14 A That is correct.

15 Q You could have raised these questions very early.

16 A I think when you look at the posture --

17 Q Without any confusion whatsoever.

18 A I don't think so. I think that there would have been
19 as much confusion then as there would have been when we filed
20 a lawsuit, but any petitioning group trying to accomplish a
21 ballot position finds itself in a posture of doing everything
22 possible to get on the ballot without filing a lawsuit. Any
23 candidate throughout the country is really trying to accomplish
24 its political objectives, and if they can get on the ballot by
25 using an alternate, as is the case in many other states,

1 there are other states that have denied independent nominating
2 petitions which turn around and give you a political party
3 method that is practically the same, or attainable.

4 These people apparently thought, and I say "appar-
5 ently" because I wasn't there then -- apparently thought we
6 needed 15 percent; even though it is burdensome, we have enough
7 we have enough strength to meet the 15 percent, and I assume
8 that that is why they proceeded, hoping they could get the 15
9 percent and get on the ballot and not have to file a lawsuit.

10 Q They did know at that time, didn't they, that is, in
11 January when they organized the party, that they had no officers
12 that would have enabled them to comply with the state law?
13 They knew that, didn't they?

14 A From what I have been able to gather, they felt
15 that --

16 Q The law was there. The law was there, and you are
17 attacking it now because you couldn't have complied, you say.
18 Now, didn't they know that in January, as well as know it now?

19 A They obviously did not.

20 Q You say they didn't. Maybe they didn't read the
21 statute. I don't know. But if you could know it now, they
22 could have known it in January, couldn't they?

23 A It certainly was knowable at that time.

24 Q I beg your pardon?

25 A It was knowable.

1 Q It was knowable, as you say.

2 A Yes.

3 Q Do you think they have a right to proceed after that
4 without any effort to meet that portion of it, or to complain
5 about it for a matter of six months, until July 29th?

6 A My only answer is that they felt they met substan-
7 tial compliance, they went full steam ahead, and even with
8 substantial compliance they wouldn't get on the ballot. They
9 filed a lawsuit as timely as possible. They filed a lawsuit
10 in sufficient time to allow a court to adjudicate this case,
11 the case has been able to come all of the way up to the Supreme
12 Court in time to grant relief. Justice Stewart was able to
13 grant temporary relief without disrupting the Ohio ballot, and
14 so -- true the lawsuit is late, but is it so late that 400 and
15 some thousand voters in Ohio's right to suffrage should be
16 denied?

17 I agree that the lawsuit is late, but I don't think
18 relief should be denied, just because these people didn't file
19 earlier. I don't think the doctrine of laches would be
20 applicable when we are talking about the voting rights of in
21 excess of 400,000 citizens of Ohio.

22 Q This in light of the fact you mean that under Justice
23 Stewart's order, there are in fact in existence the ballots which
24 contain the designation?

25 A Yes.

1 Q That is, unless for other reasons that designation
2 should be deleted. Your point is that laches can't feature in
3 that?

4 A Yes, that is precisely it. Our having filed this
5 lawsuit late made it difficult for my friend, Sam Luchman, to
6 defend it, I am sure, but I don't think that the rights of any
7 Ohio citizens have been prejudiced, because temporary relief
8 has been granted much later than that.

9 We feel that when you look at this case as a question
10 of the rights of 450,000 voters, the doctrine of laches would
11 not be applicable.

12 If I could, I would like to reserve just a couple of
13 minutes for rebuttal.

14 Q Certainly, but did I understand you to say that you
15 handed these petitions to the election officials and they
16 refused to consider them?

17 A I myself, when I first came in the case, and I have
18 it in writing, communicated with Ted Brown, Secretary of State,
19 and said, "I have the petitions. If we give you a sufficient
20 number, will you put him on the ballot?" and they said, "No."
21 The only --

22 Q Would you state that again, please?

23 A When I came into the case, I notified the Secretary
24 of State how many signatures we had, that we could meet the
25 requirements and that if we presented those petitions to him

1 would he provide ballot position, and he wrote back and said
2 no.

3 Then we have the quandry of what do we do with these
4 petitions. We notified opposing counsel that we had them, that
5 we had them in our offices. Did they want to inspect them.
6 They did not.

7 We turned them over to a certified public accountant
8 who could attest to the accuracy of the number and no duplica-
9 tions, and they have been in storage ever since.

10 Q You may have five minutes additional to finish, and
11 counsel may have an additional five minutes, also.

12 Mr. Lopeman, you may proceed with your argument.

13 ORAL ARGUMENT OF CHARLES S. LOPEMAN, Esq.

14 ON BEHALF OF APPELLEES

15 MR. LOPEMAN: Mr. Chief Justice, Mr. Justices of the
16 Court, may it please the Court:

17 At counsel table with me is Alan Schwarz, a member
18 of the bar of the State of New York.

19 First, I would like to clear up a typographical
20 error that appears in our brief on page 19. The error was
21 discovered too late to change. It was discovered while the
22 messenger was deliberating the briefs to this Court, and he
23 misunderstood the direction.

24 On page 19, it should be "November, 1967." The
25 "1968" should be crossed out, and "November" should be left.

1 Instead of "1968," it should be --

2 Q 1967.

3 A Yes, and this is required by the District Court's
4 opinion at page 16.

5 Although appellant does not make the argument today
6 during oral argument that the appellee must cross appeal, if
7 he would question the basis on which the lower court decided
8 the case, some suggestion was contained in his reply brief to
9 that principle.

10 We would only cite the Court to these cases, Letule v.
11 Scofield, 308 U.S. 415;

12 Lucas v. Alexander, 279 U.S. 573;

13 Langnus v. Green, 282 U.S. 531

14 Q What was your first citation, Mr. Lopeman?

15 A Letule v. Scofield, 308 U.S. 415.

16 Q Yes. What point do you cite them on?

17 A The proposition that an appellee may argue any -- may
18 use any argument to support an order of a trial court, even if
19 that order -- even if the argument is inconsistent with the
20 basis for the order.

21 Ohio election laws require that a candidate for
22 President must be nominated by a national political convention
23 to which delegates have been selected in an Ohio primary.

24 In Ohio, in order to qualify as a new political party,
25 the group seeking to qualify must present signatures of 15

1 percent of the total vote of those voting in the last gubernatorial election.
2

3 These requirements reasonably protect a valid state
4 interest. As we point out in our brief, at any given time
5 there is a substantial number of disaffected people, disaffected
6 with the candidates or the programs of the two major parties.
7 This group is obviously issue oriented, and by signing an
8 independent nominating petition, they are at most expressing
9 some adherence to a principle.

10 In the interests of preventing any would-be candidate
11 or leader from coming in and grabbing this group without a
12 contest, the Ohio law requires that the candidate submit himself
13 to a primary election.

14 This gives the disaffected, this more or less cohesive
15 group, the right to choose its candidate, just as the primary
16 laws give the members of the Republican and Democratic Parties
17 the right to choose their leaders.

18 The 15 percent requirement dovetails with this pri-
19 mary requirement by preventing a would-be leader from coming
20 in, circulating qualifying petitions, obtain only a few numbers,
21 and thus limiting those who would vote in primaries to sign.

22 Of course, he would select the people who would be
23 expected to support his candidacy.

24 Another would-be leader with parallel political
25 philosophy might be deferred by the initial filing from filing

1 another qualifying petition.

2 The requirement that a primary be held supports the
3 logical state interests in preventing a disaffected group from
4 splintering itself. It aids the disaffected in the reasonable
5 goal of remaining to some extent cohesive so they might be
6 effective, and in addition the state has an interest in knowing
7 the extent of the disaffection so that it may accommodate this
8 disaffection within the system, if that is possible.

9 Q Mr. Lopeman, what interest does the state have in
10 preventing splintering of a political party?

11 A Because the splintering distorts, your Honor, the
12 effect and weight of the disaffected group.

13 Q Is the state interested in the political parties, or
14 the voters?

15 A The state is interested in both political parties and
16 voters, but, also, it is --

17 Q If a group of voters want to leave a party or, to
18 use your words, "splinter it," they do not have that right?

19 A I am sorry. I did not mean splinter from a party.
20 It is splintering from the initial candidate who has filed to
21 accommodate himself to the disaffection.

22 The state has an interest in maintaining the dis-
23 affection in such a form that it is not distorted, and it is
24 not splintered, but this is not the party; it is the disaffected
25 group, so the state may know the extent of the disaffection.

1 Q You really don't want the third party.

2 (Laughter.)

3 Q May I ask you this: In what sense do you use the
4 word "disaffection"? Disaffection from what?

5 A Disaffected from the two major qualified parties, or
6 any number of qualified parties.

7 Q This disaffection, it is a determination on their
8 part to have a candidate to support their views, and we don't
9 start from the premise, do we, that because a man doesn't want
10 to be a Republican or Democrat, that he is disaffected, do we?

11 A That is true, your Honor, and we in the State of Ohio
12 would seek to preserve the right of these people to select their
13 candidate, but we also want to prevent any would-be candidate
14 from coming in and grabbing the support of the whole group just
15 because he is first. That is the interest that the state seeks
16 to preserve through the primary requirement and the 15 percent
17 requirement.

18 Q May I ask you: If the state takes the position that
19 it is now impossible to interfere to regulate the elective
20 process, to grant relief in this case --

21 A It would certainly provide an interruption, but more
22 significant, it would --

23 Q What I want to know is, whether it is now practical
24 and reasonable for the state to permit voters to consider this
25 party along with the others.

1 A Yes, your Honor, pursuant to Mr. Justice Stewart's
2 temporary order, the state has put itself in a position that
3 it can comply with an order of this Court.

4 Q So that that question is not volatile one way or the
5 other?

6 A That is right, in this case it is not.

7 Q It is just in this one case?

8 A Yes, that is correct, your Honor.

9 Q Would your answer be otherwise in the next case?

10 A Yes.

11 Q Mr. Lopeman, I suppose we should be bothered by the
12 urgency of this matter, should we not? Can you tell us from the
13 point of view simply of the mechanics of the state officials
14 carrying out their duties in order to run a proper election in
15 the State of Ohio, including absentee voters and sick voters
16 and military voters overseas, and so on, how soon the state
17 will need to know the decision of this Court, whatever it may
18 be, in order to carry out the Ohio election?

19 A Clearly, your Honor, as quickly as this Court can
20 decide, but I would say that if a decision is made by the 15th
21 of October, it is my understanding that the state can comply
22 with the order, whatever it is.

23 Q That is a week from today.

24 A Yes, sir, that is correct.

25 Q A week from tomorrow.

1 A The three-judge court found that probably as early
2 as 1964, and certainly before November, 1967, the appellants
3 had been fully briefed by the Secretary of State as to the
4 requirements for ballot position in Ohio.

5 Consequently, the appellants had adequate time after
6 November, 1967, to file a declaratory judgment action, question-
7 ing the Ohio statutes, which they feel are invalid, and if that
8 had been done, and if these statutes had been determined to be
9 invalid, there would have been time for the Ohio General
10 Assembly to reconsider the laws and amend them to comply with
11 any order which would have held these laws invalid.

12 It would have preserved the requirement of a primary,
13 by one manner or another, or in the alternative, the Court
14 could have adopted a procedure for this one election, which
15 would have satisfied all the objections that they might have
16 found in the Ohio election procedure.

17 Q Mr. Lopeman, as I understand your adversary's position,
18 and maybe I am wrong about this, it is that nobody can comply
19 with this Ohio statute. That is to say, no third party or
20 independent party, or independent party candidate can comply
21 with it, regardless of when the party starts.

22 Has anybody ever complied with it? Has there ever
23 been a third party or an independent candidate for President on
24 the Ohio ballot since the adoption of this statute?

25 A No, your Honor, there hasn't, but --

1 Q Do you concede that as a practical matter it would
2 be impossible to comply, and do you say that nevertheless the
3 Ohio statute is defensible? Is that your position?

4 A No, your Honor. The State of Ohio does not maintain
5 that it is impossible. We firmly believe that it is possible
6 to comply with the requirements, but nevertheless, pursuant to
7 the authority of Article II, Section 1, clause 2, the State of
8 Ohio is given plenary power to establish -- to appoint presi-
9 dential electors in any manner it may direct.

10 Q Let me see if I clearly understand this, now.

11 Your position is that even if it were impossible to
12 comply, to get a third party or an independent candidate on the
13 ballot, it is Ohio's position that Ohio is still constitution-
14 ally justified in imposing such prohibition, but that you also
15 argue that as a matter of fact it is possible to comply with
16 the requirements of the Ohio statute.

17 Is that right?

18 A That is correct, your Honor.

19 Q The lower court found to the contrary, did it not?
20 The lower court found that there could not be compliance with
21 the Ohio statute?

22 A We have trouble with the order, the decision and the
23 order of the lower court, and I do not believe that order is
24 clear what findings they did in fact make.

25 Q I am not entirely clear on them myself, and you say

1 you don't know whether there is a specific finding to that
2 effect?

3 A We don't believe so, but, again, there is some
4 ambiguity.

5 Q May I ask you this: If you say there is no limita-
6 tion upon a state whatsoever by reason of the section of the
7 Constitution, would you say that the State of Ohio could pro-
8 vide that no one could file in the state except Democrats, for
9 instance, instead of just saying nobody can file except
10 Democrats and Republicans? Could they limit it to Democrats
11 if they wanted to do it, without constitutional invalidity?

12 A The question of the extent of the power of Article II
13 has not been decided because of the dearth of cases considering
14 this.

15 However, it is not our position that the exercise of
16 Article II power is without any limitation at all.

17 We recognize that the state must comply with the
18 constitutional commands, specific constitutional commands, but
19 the thing that we argue --

20 Q What constitutional commands?

21 A The Constitution, the commands of the First Amendment
22 as it applies to the state pursuant to the due process clause
23 and the Fourteenth Amendment.

24 The State of Ohio --

25 Q What about equal protection?

1 A Equal protection, after -- well, first, the state is
2 not -- the state legislature is not required to have an
3 election. That is clear after McPherson v. Blacker, and this
4 was affirmed as recently as 1951 in Ray v. Blair, but if the
5 Court, if the state legislature is not required to have an
6 election at all, when it does have an election, the require-
7 ments, the equal protection standard of representative govern-
8 ment cannot apply.

9 There is no reason in the Constitution for its
10 application, because if the state legislature may appoint
11 electors without considering of having a popular vote, there is
12 no reason to say that it must -- that when it does have an
13 election it must comply with these requirements.

14 Q We will recess now.

15 (Whereupon, at 12:00 noon, a recess was taken.)
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12:30 p.m.

MR. CHIEF JUSTICE WARREN: Mr. Lopeman, you may continue your argument.

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

When the argument broke for the luncheon recess, I was considering the application of the equal protection clause to the Article II powers vested in the State legislatures. We agree that the equal protection clause may very well apply some limitation to the power of the State legislatures to direct the appointment, or the manner of the appointment of presidential electors.

We believe that that power may be limited in such a respect that the State legislatures could not disqualify anyone from being an elector on the basis of race. However, no claim has been made that the Ohio procedures violate these kinds of equal protection guarantees.

We do deny, however, that there is any limitation on the legislatures' power based on the principle that electors should be chosen on the basis of popular support of candidates.

The McPherson case recognized, and appellants concede, that the legislature has the right to appoint electors. When the legislature does appoint directly, it cannot appoint on the basis of popular support for the simple reason it doesn't.

1 know the popular support, no election having been had.

2 The argument could be made, however, that once an
3 election is held, that some other kind of equal protection
4 limitation certainly appears.

5 Equal protection is not particularly applicable to
6 elections. It applies equally to the legislature when it
7 appoints directly or when it holds an election.

8 Q On the question of equal protection, do you make
9 any distinction in these two cases that we are hearing argu-
10 ment on today? That is, in the result to be achieved, that
11 is, that one could prevail and the other could lose?

12 A Not on equal protection, Your Honor. Both must
13 fail on equal protection, because equal protection is not
14 applicable.

15 However, in a situation where there is no right to
16 have a vote but a vote is nevertheless had, for example,
17 the situation in Georgia where this Court held that there is
18 no Constitutional right for the Governor of a State to be
19 elected by popular election, nevertheless, Gray would suggest
20 that there is some kind of limitation based on equal pro-
21 tection that applies to this situation.

22 However, this other kind of equal protection is
23 not representative government, for, if it were, how can this
24 Court explain Fortson, although the election was not required
25 to be held, when it was held, this Court allowed the legislature

1 to disregard the result of that vote and select the candidate
2 receiving the least popular votes.

3 Q Well, then, you don't concede that if Ohio provides
4 for an elective process, to get on the ballot for the
5 presidency, that that must be in accordance with equal
6 protection?

7 A No, Your Honor, I am not saying that. I am saying
8 that there may be some requirements.

9 Q Do you say the opposite, that they are not required
10 to honor equal protection if they have an election?

11 A They are required to honor some of the guarantees
12 contained in equal protection, that is race, religion, and
13 belief. But they are not required to hold the election on
14 an equal protection basis of representative government or
15 any theory that the electors chosen must be the result of
16 popular support of the candidate, because in the Fortson v.
17 Morris case, it is impossible to reach that result.

18 The election was held, this Court allowed the
19 legislature of Georgia to select the candidate not receiving
20 the most popular votes. Representative government in this
21 situation, and the analogous situation of the right of the
22 legislature to select presidential electors, and the additional
23 provision that they need not have an election requires that
24 if an election is held, it has to meet certain Constitutional
25 protection safeguards.

1 We cannot discriminate against the voter. We can
2 only discriminate against the right of the voter to have his
3 candidate have a chance to win, which is exactly what happened
4 in the Fortson v. Morris case in this Court.

5 Going back to the reasonableness of the laws of
6 Ohio, we would suggest an additional reason for the require-
7 ment that a primary be held and the requirement of 15 per cent
8 support, and that is the experience in Ohio in the years 1944
9 and 1948, in the presidential elections in those years.

10 The elections were very close in both years.
11 A third party, by taking support away from one of the two
12 major parties who had a chance to win the election, could
13 distort the result of the election in Ohio by giving the
14 entire electoral votes of Ohio to the less popular candidate.

15 Q Why couldn't that happen in any State, where you
16 had three parties?

17 A There is no question it can, Your Honor, and we
18 believe that any State can provide against that.

19 Q Therefore you limit it so that nobody but Democrats
20 and Republicans can contend with each other?

21 A The State legislature, pursuant to Article II,
22 has not limited that, but has provided that in order to
23 participate there must be a showing of the possibility of
24 substantial political effectiveness. That is the 15 per cent
25 requirement.

1 It is a balancing by the State of the competing
2 interests. One is the interest in not distorting the popular
3 vote of those who may win and giving some voice to the party
4 that may be effective although it can't win.

5 Q Suppose that the act said 60 per cent, would you
6 defend the act?

7 A That is a legislative problem, Your Honor, and of
8 course I would defend it if the legislature passed it, but
9 that is certainly not a judicial question that can be answered.
10 There are no Constitutional standards.

11 Q It is a question of equal protection, particularly
12 to see whether they would set up too much of a requirement.
13 Why wouldn't it be a judicial question?

14 A Because, Your Honor, the legislature is not re-
15 quired to have an election at all, and when it does --

16 Q Suppose they said they could have an election with
17 another party, and they get 95 per cent of the people on the
18 ticket?

19 A It would be our position that Article II, Section 1,
20 Clause 2, authorizes the legislature to have that kind of
21 requirement.

22 Q Then you would say that equal protection doesn't
23 apply?

24 A Some parts of the equal protection clause apply.
25 We could not disenfranchise voters from voting in the election.

1 This would be Gray v. Sanders.

2 We have to give the Wallace people or any other
3 people the right to vote in the election if we are having it.
4 All we can do is control the candidates who are going to
5 be submitted for the reason that we have the absolute right
6 to make the selection ourselves in the legislature.

7 Q You say it is an absolute right to appoint through
8 the legislature? It has an absolute right to say there
9 shall be only two parties in the State?

10 A For the purpose of selecting presidential electors,
11 yes.

12 Q That is what I mean. That is the extent of your
13 argument, isn't it, on this point?

14 A That is correct, Your Honor.

15 Q Mr. Lopeman, is there a distinction between the
16 right of a candidate to appear on the ballot, have his name
17 appear on the ballot, and the right of a political party?

18 Now, there is in the Ohio election law, as I read
19 it, elaborate requirements for a party to appear or to get
20 its name on the ballot, it has to have a primary, and so on.
21 It would seem to me perhaps arguable that there is a reason-
22 able distinction between what a State may do with respect
23 to requiring a political party to qualify on the one hand
24 and allowing an individual candidate to qualify on the other
25 hand.

1 For example, in one of the other cases before us,
2 the California case, I notice that they have separate pro-
3 cedures for qualifying a candidate. He can be placed on the
4 ballot by receiving a certain number and a relatively modest
5 number, as I recall it, of signatures.

6 But a political party, or for a political party,
7 California has more onerous requirements.

8 Now, the order that has been entered pending final
9 decision in this case provides that Ohio shall show on its
10 ballot both the name of the American Independent Party,
11 and the name of Mr. Wallace and his vice presidential candi-
12 date.

13 The point that I am asking you about is whether
14 you would make any argument to the effect that the Ohio re-
15 quirements are certainly valid and reasonable with respect
16 to a political party, even though we might conclude that
17 they are not reasonable and Constitutional with respect to
18 the qualifications of an individual as a candidate or his
19 electors?

20 A No, Your Honor, I do not believe there is a dis-
21 tinction, based on the power of Article II and the plenary
22 power that the legislatures have, whether or not it is an
23 individual candidate or a party.

24 Q I understand that argument, but on the other hand
25 if you assume that the State's power has to be exercised

1 reasonably -- I know you don't make that assumption in
2 the light of your argument -- but if we should arrive at
3 the conclusion that the State's power has to be exercised
4 reasonably, is it possible to say that on analysis of the
5 Ohio law that the State is exercising its power reasonably
6 with respect to a political party but not reasonably with
7 respect to the candidate?

8 A No, Your Honor, we believe that the State of Ohio
9 is acting reasonably with respect to the candidate, too,
10 for the reason that the State has a legitimate interest in
11 protecting against the distortion of the popular vote against
12 the two candidates having a chance to win.

13 Q Is there any way that an individual can get on the
14 Ohio ballot except through the party route?

15 A A presidential candidate, Your Honor?

16 Q Yes.

17 A No, there is no way that a presidential candidate
18 or his electors can participate in a presidential election
19 in Ohio except through a party primary, and a party ballot.

20 Q Mr. Lopeman, I have a mechanical sort of a question.
21 The interim relief that I granted, as I remember, required
22 the State of Ohio for the time being to put on the ballot
23 the names of the American Independent Party, and George
24 Wallace, and a man named Griffin.

25 Now, I read the papers every now and then, and

1 Griffin wouldn't seem to be the right name, would it? Would
2 this require re-printing, whatever the Court's decision is
3 in this case?

4 A I think that that question would better be left
5 to Counsel for appellant, because I don't know what they do.

6 Q It has some importance, I suppose, that we try
7 to know.

8 A Let me say that if the Ohio ballots are required
9 to be re-printed with a different name for vice president,
10 we are now too late to accomplish the result. It is too
11 late, and we are too far down the road to change the ballot
12 to that extent. The ballots have been printed and put in a
13 preparatory form to comply with any possible order of this
14 Court pursuant to your order, but we can't come up with a
15 new name.

16 Q And the name on there for vice presidential candidate
17 is Griffin, is it not?

18 A That is correct.

19 Q That just isn't right, is it?

20 A It is pursuant to Mr. Justice Stewart's order.

21 Q But as a matter of fact, he isn't the vice presiden-
22 tial candidate, is he?

23 A So far as we know.

24 Q I guess he is for purposes of the Independent Party
25 in Ohio. Those electors, if Mr. Wallace carried the State of

1 Ohio, the electors would have to go to the electoral college
2 and vote for Mr. Griffin?

3 A Well, that's another question, Your Honor. We
4 feel that probably the presidential electors, once they are
5 chosen, are not bound by names appearing on the ballot,
6 but we admit we don't know the answer to that question.

7 Q You don't think the Ohio electors are bound?

8 A We don't know the answer. This Court has not
9 decided it, and we don't know.

10 Q What does Ohio law say, though, and doesn't the
11 Ohio law purport to bind electors to vote for the candidate
12 of their party?

13 A Only as of the time they are nominated by the
14 convention, which is another thing --

15 Q Do you think under Ohio law an elector may be
16 free to vote in the electoral college, to vote for anyone
17 he wants to?

18 A An elector may be, yes.

19 Q Couldn't he be punished? You don't think that
20 it is binding?

21 A That is correct, Your Honor, although it may be
22 a provision of state law, I guess we feel that there is a
23 serious question about its enforceability.

24 Q In what respect?

25 A The possible conflict between the rights, duties,

1 and authorities of electors, under the Federal Constitution,
2 and the requirements of law binding them.

3 Q That was decided in Ray v. Blair, that was a case
4 in which Alabama did require by State law that the electors
5 vote for the national candidates of their party, and this
6 Court in an opinion by Mr. Justice Reed held that this did
7 not violate either Article II, Section 1, or the Twelfth
8 Amendment.

9 Is there a provision of Ohio law which purports
10 to require electors pledged to a certain presidential candidate
11 to vote for him?

12 A I have been advised by co-counsel that there is a
13 requirement. It was one with which I was not familiar.

14 We base much of our case on the authority of
15 Article II, but even if it didn't exist, appellants could
16 not prevail on this appeal.

17 Although one man-one vote is an applicable standard
18 for judging legislative apportionment cases, it does not
19 answer the questions raised by the interrelationship and the
20 interaction of third party candidates in presidential politics.

21 History shows us the third party candidates do not
22 win presidential elections in Ohio.

23 Q What is that statement again?

24 A I say history shows us that third party candidates
25 do not win presidential electors in this country.

1 Q You mean because they haven't, they should be
2 prohibited from doing it?

3 A The question I would suggest, Your Honor, is this
4 Court prepared to make the judgment that they can or they
5 cannot? Again this is a problem that this Court faces.

6 Q Don't we, rather, face the question as to whether
7 the State of Ohio can limit the elective process to between
8 Republicans and Democrats alone, without the right of a
9 citizen to vote for anyone else but one of those two parties?

10 A The question isn't the right of the citizen to
11 vote, it is the right of the legislature to place qualifica-
12 tions in the path of one seeking to be on the ballot.

13 Q They have the right to afford the people an oppor-
14 tunity to vote, do they not?

15 A Yes, they do.

16 Q For the person of their choice?

17 A That is right.

18 Q Do they have the right to limit it to Republicans
19 and Democrats?

20 A Yes, Your Honor, they do, pursuant to Article II.

21 Q Could they limit it just to Democrats, if they
22 wanted to?

23 A Yes, insofar as they could not have elections,
24 they can limit it.

25 Q Could they have elections, and they could say, "We

1 don't care to have the Republicans vote, and we will limit
2 it to Democrats alone." Could they do that?

3 A Well, that case is not before this Court.

4 Q No, it isn't before us.

5 A But the State doesn't do that, and there may very
6 well be some First Amendment guarantee which would apply,
7 and which would prevent the State from doing that.

8 Q Let me put it to you in this way then: If they
9 can limit it to two parties, why can't they limit it to one?

10 A They can. That is our position.

11 Q All right.

12 A The effect on the electoral process of third parties
13 lies in the tyranny a cohesive minority can exert over
14 major parties. Does the standard of representative govern-
15 ment require that a tyrannical minority can sway and affect
16 the positions taken by majority parties? Is this good or
17 bad?

18 Q Is this restricted to tyrannical minorities or
19 not? I am using your words now.

20 A Well, I didn't use the word "radical."

21 Q I said tyrannical. Is it restricted to tyrannical
22 minorities, or all minorities?

23 A The question the Court faces is whether it is re-
24 stricted at all. The Court must answer whether there is
25 any standard by which it can do this.

1 Q You used the word "tyrannical" minorities. I want
2 to know what you are talking about.

3 Number two, I asked you: Is it restricted to
4 that, or are you trying to stop tyranny or are you trying
5 to stop minorities from voting?

6 A I think the State is reasonably trying to stop
7 the exercise of a tyranny by minority parties on major
8 parties. For example, in Israel --

9 Q Let me get you straight. A minute ago you said
10 history shows that no minority party has ever won. Five
11 minutes later you are arguing about the tyranny of minority
12 parties. Are you talking about the same minorities?

13 A Yes, that is correct, Your Honor.

14 Q They have never won, but still it is tyranny?

15 A That is correct, Your Honor.

16 Q That is interesting.

17 A And a good example is the situation that we know
18 exists in Israel. A very small --

19 Q In Israel?

20 A Yes, Your Honor. If it can exist in Israel today,
21 it could have existed in Ohio in early 1950's. A small
22 religious party in Israel requires the two major parties
23 to conform with its religious philosophy.

24 Q Isn't there a little difference in government,
25 and people, and area, between Israel and the United States?

1 Let us talk about the United States.

2 A It would be the same if this kind of thing happened
3 in the State of Ohio, and what I am suggesting is that this
4 Court does not have a standard to answer the question whether
5 this is good or bad. Certainly the standard of representa-
6 tive government does not answer this question.

7 Q We still have the Fourteenth Amendment.

8 A Representative government does not or cannot answer
9 this question, whether a tyranny --

10 Q I think the Fourteenth Amendment and due process
11 can answer the question as to whether you can restrict the
12 right to vote to one political party. Wouldn't you agree?

13 A Not for presidential electors, Your Honor. The
14 Article II power would exclude the right to make this restric-
15 tion.

16 Q So if fifty States decided only Democrats can vote,
17 Republicans would be out of business, wouldn't they?

18 A Yes, that is true, but the answer to this kind of
19 unfairness in the legislature is electing a new legislature,
20 and when the legislature is elected by one man-one vote,
21 we can be reasonably sure that this kind of thing will not
22 happen.

23 Finally, where do we get the idea that representative
24 government applies to presidential politics, when the whole
25 process is not representative? The electors are selected

1 in the states as a unit. The popular vote frequently differs
2 from the electoral vote, and certainly there is no mathematical
3 correlation, again one man-one vote does not apply.

4 There is a further distortion by the provision
5 that each State gets two electoral votes for each Senator,
6 thereby increasing the representation of the smallest State
7 over the larger States. If there is no majority in the
8 electoral college, and the election goes to the House of
9 Representatives, the winners are decided on the basis of
10 each State having one vote, and this certainly over-
11 emphasizes the political representation of the small States.

12 And finally, the electoral college may choose, or
13 the House of Representatives may choose, among the three
14 highest candidates, and it is not limited to the highest,
15 and so the value of one man-one vote doesn't apply. Since
16 it is not a part of the system, and since the electoral col-
17 legiate principle does not include representative government,
18 why must we say that any one part of it must?

19 For these reasons, one, that the Ohio General Assem-
20 bly is given broad plenary power pursuant to Article II,
21 for the question that this Court really doesn't have standards
22 to answer the questions involved in the interrelationship
23 between third parties and presidential politics, for the
24 reason that the Ohio laws are reasonable and are reasonably
25 designed to accomplish a valid objective, and finally that

1 the cases in this Court show definitely that, although when
2 an election is not required to be held, if it is held, it must
3 have some fairness, but that does not include the right to
4 maximize or equalize the chance of the voters' candidate
5 winning.

6 And I again emphasize Fortson v. Morris

7 For these reasons this Court should affirm the
8 order of the United States District Court.

9 Q Mr. Lopeman, will you tell me, please, what the
10 petitioner should have done in order to comply with your
11 law prior to the time that he brought this action on the 29th
12 of July, but did not do?

13 A Yes, Your Honor. If this petitioner had questions
14 about Ohio election laws, and these other laws that have
15 been referred to -- first let me say that they do not relate
16 to third parties, and the District Court did not find they
17 related to third parties, and the Ohio Supreme Court in
18 Beck v. Hummel says that the election laws will be liberally
19 construed and that this Court should probably not consider
20 initially the constitutionality of election laws not con-
21 sidered by the Court below -- if they had questions about
22 these laws, they should have filed a declaratory action some
23 time prior to February of 1968.

24 Further, if they were clear about what the laws
25 required, they should have gone out and gotten signatures

1 on their petitions prior to the filing date, which was some-
2 time in February of 1967, to qualify their party as a
3 political party in Ohio.

4 At the same time they could have encouraged people
5 who were signing these petitions to run for county committees
6 and state committees.

7 Q But do you have to go that far at all? Even if
8 the rest of the provisions are invalid, they didn't satisfy
9 that very first one that you are talking about.

10 A That is correct, Your Honor. But I was just out-
11 lining the procedure that should have been followed.

12 Q How about the point that was made that if the
13 rest of these provisions are invalid, then there was no
14 need to get these names before February? Is there such an
15 interlocking between these provisions that if these other
16 provisions were invalid, the names wouldn't have to be
17 filed until ninety days before that date?

18 A If the requirement is a party in Ohio must have
19 a primary, a party primary, to get on the ballot, then clearly
20 they would have had to file the petitions sometime in
21 February 1968 because it would be impossible for a party to
22 have a primary.

23 Q The hypothetical provision is that the primary
24 under Ohio law was unconstitutional, and if we were to con-
25 clude that it was unconstitutional, what then of the fact

1 that they did actually get the 15 per cent of the signatures
2 but they did not get them until after the February date?

3 A They would certainly unnecessarily delay their
4 action.

5 Q As I understand your adversary, he argues that if
6 all of these provisions keyed to the primary are unconstitu-
7 tional, then the 15 per cent requirement should be read as
8 satisfied, so long as the signatures were collected ninety
9 days before the general election.

10 A Insofar as the District Court did not consider these
11 questions and did not decide that they were unconstitutional,
12 it is not for this Court. But as a representative of the
13 Attorney General of Ohio, I am telling you that these require-
14 ments, other requirements of law, fairly read, do not deny
15 ballot position to third parties, or make it impossible for
16 third parties to qualify.

17 Therefore, if it is not impossible, they could
18 have done it, and they could have done it last spring.

19 Q At least the provision requiring a primary would
20 be reasonable.

21 A There is no question of that provision, and I
22 would suggest it is reasonable. Thank you.

23 Q How about a national convention? That is another
24 requirement, and I suppose there is no way on earth that
25 even all of the people in Ohio could require a party to

1 have a national convention. It would take cooperation from
2 the people of other states, wouldn't it?

3 A That is correct, Your Honor, but again that is one
4 of the things that is required to get on the ballot in Ohio,
5 one of the requirements the Ohio General Assembly has
6 provided pursuant to the grant of authority in Article II,
7 Section 1, Clause 2.

8 Thank you.

1 MR. CHIEF JUSTICE WARREN: Mr. Young?

2 REBUTTAL ARGUMENT OF DAVID J. YOUNG, ESQ.

3
4 Q Mr. Young, who is the vice presidential candidate
5 of the American Independent Party in Ohio?

6 MR. YOUNG: I am an attorney, not a politician. Marvin
7 Griffin's name should appear on the ballot.

8 Q This is a question that goes to the issue before
9 us. You are asking this Court, in effect, to order that
10 the name of Mr. Griffin be placed on the ballot as a candidate
11 for the office of Vice President of the United States?

12 A That is correct.

13 Q I would suggest to you, therefore, that I want to
14 know who is the candidate for the office of Vice President
15 of the United States of the American Independent Party in
16 Ohio.

17 A I will answer you that we are perfectly satisfied
18 with the order of Justice Stewart, placing on the ballot
19 the names that appear in his order. We do not seek to have
20 that order modified.

21 Q I understand that, but I am asking you whether
22 he is the candidate of the American Independent Party, and
23 if he is, if your answer to that is yes, then I want to know
24 two things: Does the record show how he was selected, number
25 one, and number two, will the effect of this Court's order

1 mean that, if the voters of Ohio vote for the American
2 Independent Party's ticket, that the electors will cast
3 their ballot for Mr. Wallace and Mr. Griffin?

4 A I think that I can answer that by starting at the
5 back. Ohio has no requirement that the electors vote for
6 a person to whom they are pledged.

7 Q You and your adversary arrive at diametrically
8 opposite conclusions on that question.

9 A My adversary said he wasn't aware of any statute
10 but that someone told him today.

11 Q The someone was his co-counsel, wasn't it?

12 A If there is one, I would like to see it cited,
13 and I would ask co-counsel during the argument to send me
14 over the statutory provision, because I have never been
15 able to find it, I don't know which one it is.

16 Q All right. To get to my next question, that is
17 to say, if this Court orders that the American Independent
18 Party appear on the ballot, and the names of Mr. Wallace
19 and Mr. Griffin appear on the ballot, what will be the effect
20 of this Court's order in the event that the people of Ohio
21 give that ticket a plurality of their votes?

22 A Governor Wallace under those circumstances has
23 announced his position, and he has indicated that he would
24 come in --

25 Q I am asking a question of law, and I am not interested

1 in the politics of this.

2 A You are asking me, I beg your pardon, it seems
3 to me, a political question.

4 Q I am asking you what the legal effect will be.
5 Will the legal effect be that the electors will have to
6 cast their vote for Mr. Griffin as vice president?

7 A No.

8 Q Or will they not?

9 A We don't think that that would be the legal effect.

10 Q You are saying that legally they will be free to
11 vote to cast their vote for someone else for vice president?

12 A Yes, Your Honor.

13 Q Now, is Mr. Griffin the candidate, in whatever
14 sense you want to put it, at the present time, of the American
15 Independent Party of Ohio?

16 A Now, if you will allow me --

17 Q In any sense whatever?

18 A If you will allow me to repeat what I have read in
19 the papers, I will be glad to tell you that. I am not a
20 member of this party. I can tell you that it is my understanding
21 that Governor Wallace will command the electors to vote for
22 Curtis Lemay as Vice President of the United States.

23 Q How was Mr. Griffin originally selected before
24 you started to represent this client?

25 A The petitioners who signed this petition,

1 450-some thousand people gave to the three men who are
2 named in the petition the authority to call a State conven-
3 tion, or in the absence of a State convention, to make the
4 selection.

5 A State convention was scheduled, and when it was
6 indicated the results of that convention would not be recog-
7 nized, then it was exercised by the other three. But a State
8 convention was called, and it was scheduled to be held,
9 and the Secretary of State has indicated that he would not
10 respect the results of that convention, and I think this
11 answers the other point as to whether all of these other
12 laws do apply to third parties.

13 Exhibit 13 in the transcript shows that the Secre-
14 tary of State said that is why he didn't let them on the
15 ballot, because of those requirements.

16 So my answer is that I do not feel the electors
17 in Ohio are pledged, and as for the vice presidential candi-
18 date, they could select Curtis Lemay rather than Marvin
19 Griffin in Ohio.

20 Q Are they obliged to vote for Wallace?

21 A No.

22 Q They can vote for Mr. "X" and Mr. Griffin if they
23 want to?

24 A As a matter of law, I think they are free to vote
25 for whomever they please in Ohio. In Ray v. Blair this Court

1 held that a State could establish pledge requirements to
2 participate in a primary. This Court left open the question
3 of whether electors are really free, even if there were such
4 a requirement, to vote for whomever they saw fit, but there
5 is no suggestion, it seems to me, for any decision if a
6 State has no pledged requirement that the electors must
7 vote for anyone. Theoretically they could vote for whomever
8 they saw fit.

9 One of the final points that I would like to raise
10 is the matter of relief that was touched upon before. The
11 temporary order rendered by Justice Stewart would satisfy
12 the temporary problem that exists, from the appellants'
13 standpoint.

14 It seems to me we have two problems. What about
15 the 1968 election and what happens henceforth?

16 The order rendered by Justice Stewart has been
17 complied with, and the Secretary of State has notified us that
18 if that order is not changed, everything is ready to move
19 with the name of Governor Wallace on the ballot. If this
20 Court finds that it is difficult to render a final decision
21 as to what is going to happen in future elections, prior
22 to October 15, then we would seek a temporary order affirming
23 what has been accomplished by Justice Stewart for the 1968
24 election, because that has already been complied with.

25 Q But you are not for a moment suggesting that that

1 is irreversible, are you?

2 A Oh, no, sir.

3 Q It is your understanding, and it is certainly my
4 understanding, that the State could, with equal convenience,
5 comply with an order which would, in effect, affirm the
6 action of the District Court?

7 A You made that perfectly clear to us, and the order
8 does, that this Court is free to order Governor Wallace off
9 the ballot, but I am saying that all steps have been taken,
10 and if no other order of this Court were rendered, he would
11 be on the ballot in the November 1968 presidential election.

12 I know the Court is troubled by the fact that we
13 did not file this case sooner. The only thing I can say is
14 that under the old law that was changed, 38 days after we
15 filed our case, these people could have gotten on the
16 ballot with 29,000 signatures as compared to 452,000.

17 In other words, if these laws hadn't been changed,
18 38 days after we filed our lawsuit, they could have gotten
19 on the ballot with only 29,000 signatures.

20 Q Is that as a party?

21 A As an independent candidate.

22 Q Independent candidate?

23 A Yes, under the old law that existed.

24 Q That is before 1948?

25 A Yes, with one per cent of the signatures someone

1 could get on the ballot.

2 Q As a candidate?

3 A That is correct, yes, and this was the method first
4 sought in Ohio by these people, and then they moved in the
5 political party direction.

6 Q The laws enacted after 1948 simply limited independent
7 candidates, they didn't really affect the laws applicable
8 to parties, did they?

9 A Except to the indirect extent --

10 Q The fact was that you could not be independent,
11 and the only way you could be a candidate on the ballot was
12 through the party machinery.

13 A Before 1948, all of the parties used the independent
14 nominating petition technique, because that provided that
15 even though you were technically an independent candidate,
16 you would put in a label, and so all of the political parties
17 in Ohio used the independent nominating petition technique,
18 but they were allowed to put a label next to the name, so
19 that there was this flourishing of independent parties under
20 the prior system.

21 Just a final point. I see my time is up. I hope
22 this case is not decided on the basis that it is possible
23 to get on the ballot in Ohio.

24 This group had 2,700,000 signatures over the
25 country and 450,000 signatures in Ohio, an adequate strength

1 to comply with any kind of a requirement, and it isn't a
2 question of time.

3 I have cited it in my brief, but there is no way,
4 they are completely barred by these statutes. I hope what-
5 ever decision is rendered is rendered on the recognition
6 that independent and third party candidates are barred,
7 and barred effectively, from participating in presidential
8 elections in Ohio.

9 I hope at least as far as the temporary relief
10 by October 15, we can receive an order confirming the order
11 of Justice Stewart, and that the situation by order of this
12 Court, or upon remand, will be cleared up in Ohio, so they
13 will have free elections.

14 Q Let me be sure I understand you.

15 What would be the effect of a final order?

16 Why do you make the distinction between a temporary order and
17 final order?

18 A Because there are two questions before the Court,
19 the matter of temporary relief and ultimate relief.

20 Mr. Lopeman's statement suggested to me that unless
21 you order his name off the ballot by October 15, they are
22 going to have a hard time taking it off. So it seems to
23 me that you have a time pressure on the temporary question
24 before you, but not as much time pressure on the ultimate
25 relief question of how do we handle all of the future elections

1 in Ohio.

2 Q You mean to say that if we rule on the merits
3 here, in your opinion, we will be deciding something that will
4 have to be decided on the constitutionality of the Ohio
5 statutes as applied in this case, or generally, and in
6 either event, wouldn't we?

7 A Yes, sir.

8 Q What you are saying is one will be an interim
9 order and one will be a final order, but we would not be,
10 in any case, adjudicating whether there is such a thing as
11 the American Independent Party as a formal Ohio party under
12 Ohio laws for future purposes? Is that right?

13 A I don't think it is necessary for the Court to do
14 that, but the name as it appears on the ballot with a label
15 would be much the same as the objective, the techniques used
16 in the State of Ohio.

17 Q What would you think if today were the last day
18 the Court could decide this case and still get the name off
19 the ballot if it was decided against your position? What
20 if this were the last day? Suppose this were the last day,
21 and you say the suggestion is the 15th? Suppose this one is
22 the last day, and after we heard this the questions are too
23 difficult to decide in one day and write up?

24 A I would probably go away pleased with the temporary
25 relief that we received.

1 Q I thought you would be. But what do you suppose
2 ought to happen to the temporary relief in that case? It
3 could be that we could not decide this case.

4 A Here is the situation that you have before you:
5 The lower court, all three judges in the court below found
6 Ohio's laws were unconstitutional and they were unconstitutional
7 insofar as they denied ballot position to independent candi-
8 dates and to third party candidates.

9 Q They said you had waited too long. They said, among
10 other things, they said laches had run.

11 A They did say that, but they also declared these
12 laws to be unconstitutional. I don't think that this Court
13 would apply laches to millions of voters, because no one is
14 hurt. Laches is a balancing of interests. Who on the one
15 hand is hurt, as compared with taking the right of suffrage
16 away from these hundreds of thousands of voters?

17 Q I know, but that assumes the fact that they have
18 some rights. That is the question that you have here.

19 A The District Court did decide that, that they had
20 rights, and they had equal protection rights, and that the
21 State of Ohio has violated the equal rights clause when
22 it denied ballot position to third party candidate.

23 Q But their decision has been appealed up here,
24 and assuming there is not time to decide it?

25 A I just have a strong belief that this Court will

1 decide the right exists under the circumstances. I am rather
2 shocked by the contentions I hear that they do not, and I am
3 confident this Court will find there are rights, no matter
4 what the outcome is.

5 Thank you very kindly.

6 Q Mr. Chief Justice, may I ask if the State has the
7 citation of the Ohio statute which binds the electors?

8 MR. LOPEMAN: No, Your Honor, we do not have.

9 Q Didn't you tell us that there was a statute?

10 A I was told by my co-counsel that he believed
11 there was. It is my understanding now that there is a re-
12 quirement in Ohio that presidential electors at the time
13 that they are certified to the Secretary of State from the
14 State political party convention are required to pledge
15 that they will vote for the candidate of the party. I think
16 that that is the only limitation.

17 Q That would not apply here in this instance, in
18 this situation?

19 A That is correct.

20 Q And there is no statute?

21 A I don't believe there is now.

22 I am going back and forth, but this is my under-
23 standing, knowing everything that I know about it.

24 Q Well, the American Independent Party will have to
25 certify a list of electors, won't it? Assuming they go on

1 the ballot, won't they have to certify a list of electors?

2 A Yes, Your Honor.

3 Q And then will those electors have to take the same
4 oath as the electors selected by the Republican and Democrat
5 Parties?

6 A I would think it would be up to the order of this
7 Court. I don't know what it is. We have departed from
8 Ohio election law now. We are way past. We are nine months
9 past the Ohio election law, and I can't answer that question.
10 You will have to answer that for me by putting in your
11 order, if there is any need to mention electors, what these
12 electors are going to do.

13 (Whereupon, the above-entitled oral argument was
14 concluded.)