

# Supreme Court of the United States

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Supreme Court, U. S.

OCT 16 1968

In the Matter of:

Docket No. 544

Socialist Labor Party,, et al.,

Appellants,

vs.

James A. Rhodes, et al.,

Appellees.

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Place Washington, D. C.

Date October 7, 1968

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I N D E X

P A G E

Oral Argument of Jerry Gordon, Esq.  
on behalf of Appellants

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Oral Argument of Charles S. Lopeman, Esq.  
on behalf of Appellers

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Rebuttal Argument of Jerry Gordon ,Esq.

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - -X  
4 Socialist Labor Party, et al., :  
5 Appellants, :  
6 v. : No. 544  
7 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 1:21 p.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:

25 JERRY GORDON, Esq.  
1748 Standard Building  
Cleveland, Ohio

BENJAMIN SHEERER, Esq.  
33 Public Square  
Cleveland, Ohio

Counsel for Appellants

1 APPEARANCES (Continued):

2 WILLIAM B. SAXBE, Esq.  
3 Attorney General of Ohio  
4 State House Annex  
5 Columbus, Ohio

6 By: CHARLES S. LOPEMAN, Esq.  
7 Chief Counsel  
8 State House Annex  
9 Columbus, Ohio

10 Counsel for Appellees

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

2                    MR. CHIEF JUSTICE WARREN: No. 544, Socialist  
3 Labor Party, et al., Appellants, versus James A. Rhodes, et  
4 al., Appellees.

5                    THE CLERK: Counsel are present.

6                    MR. SPEIDER: Mr. Chief Justice, I would like to  
7 move the admission of Jerry Gordon, of Ohio, who will argue  
8 this case.

9                    MR. CHIEF JUSTICE WARREN: It is granted.

10                   Mr. Gordon, you may proceed.

11                   ORAL ARGUMENT OF JERRY GORDON, ESQ.

12                   ON BEHALF OF APPELLANTS

13                   MR. GORDON: Mr. Chief Justice and Members of the  
14 Court, this is the companion action to the case below. The  
15 appellants were plaintiffs in the District Court of the  
16 Southern District of Ohio, and they are the Socialist Labor  
17 Party of America and its Ohio members.

18                   They brought suit to challenge the Ohio electoral  
19 system which completely excluded them from participating on  
20 an equal basis with the other political parties in Ohio, or  
21 even on an unequal basis; their rights as a political party  
22 were in effect obliterated by a series of Ohio election laws.

23                   They challenged those laws, and a declaratory  
24 judgment favoring to their position was rendered, and write-in  
25 provision was provided for the 1968 election and ballot

1 position was denied.

2 From that branch of the opinion denying ballot  
3 position we appeal.

4 The Socialist Labor Party of America is a national  
5 political party, with roots reaching back into the 19th  
6 Century. It advocates the socialist reconstruction of  
7 American society, and it advocates that this be brought about  
8 through the ballot.

9 It has never used any other means but peaceful,  
10 constitutional means to advance its position.

11 Accordingly, it places great emphasis on elections.  
12 It is currently in its twentieth consecutive presidential  
13 campaign. In 1964, it was on the ballot in sixteen states,  
14 and conducted a write-in campaign in nine others. Similarly,  
15 it has been on the ballot in Ohio going back into the 19th  
16 Century.

17 Now the party in Ohio has modest numbers. Pursuant  
18 to the request of the District Court, documents were sub-  
19 mitted which showed that the party's members equalled some  
20 approximately 108.

21 These documents also show that the party distributed  
22 in a single year, and this is customary, approximately a  
23 quarter of a million pieces of literature, or leaflets.  
24 It is a small party, but an energetic one.

25 Q Excuse me. I gather that you have a practical

1 problem here, that your client is not the beneficairy of  
2 the interim relief of the appellants in the previous case,  
3 and what is the situation if you were to prevail? Is there  
4 any opportunity? I understand the previous argument is that  
5 there isn't any opportunity to get you on the ballot.

6 A We take issue with that position. We did apply  
7 for equivalent relief.

8 Q I said the practical side is that you are not on  
9 these ballots which we are advised have now been prepared,  
10 and they have the American Independent Party name on them.  
11 You are not named on any ballot at the present time?

12 A No, sir. That is correct.

13 Q And there is a practical problem of how, before  
14 election, there can be printed, if you prevail, and dis-  
15 tributed ballots with the name of your party? Don't we have  
16 that problem?

17 A We have that problem, but it is our position that  
18 there is more than ample opportunity to print ballots or,  
19 if necessary, to re-print ballots, which in our judgment  
20 will conform to the requirements of the Fourteenth Amendment.

21 Q As a practical matter, what support do you have  
22 for the statement that there is ample time for the printing  
23 of ballots which will enable the Socialist Labor Party to  
24 appear?

25 A For one thing, and counsel on both sides have to

1 rely on representations to the Court, and that is what we  
2 did, and we have been in touch with ten counties. In four  
3 of these counties the ballots have been printed, completely  
4 printed, and in other counties ballots are in process of  
5 being printed.

6 In Cuyahoga and Mahoning County, ballots are going  
7 to be printed next week. If it is possible in a county  
8 the size of Cuyahoga County, the most densely populated  
9 county in Ohio, to still print ballots, we submit it is possi-  
10 ble in every other county. We are after all some 29 days  
11 before the election. We have many, many printers, and it is  
12 still possible to print ballots in time for that election.

13 MacDougall v. Green there were only twelve days.

14 Q But can you print and program machines in 29 days?

15 A We would concede that there will be a great problem  
16 as far as programming machines.

17 Q What per cent of the voters in the great State of  
18 Ohio are going to vote on the machines?

19 A It varies widely, and if Franklin County --

20 Q But over the whole State?

21 A We have 88 different systems, and we don't have  
22 those statistics.

23 Q What per cent of all of the voters of Ohio are  
24 going to vote through machines?

25 A I am unable to say.

1 Q Would it be 75 per cent?

2 A In Cuyahoga County it is much less, and in Franklin  
3 County it is all. It may mean that if we secured the order  
4 that we seek, that counties that had planned to conduct  
5 their elections via voting machines may have to use paper  
6 ballots. This may be the case.

7 But, at any rate, it is certainly possible at this  
8 juncture to print paper ballots for the entire state, and  
9 for Cuyahoga County their voting machines have already  
10 been programmed to provide for the Socialist Labor Party  
11 candidates in the event this Court does order those candi-  
12 dates to be placed on the ballot.

13 Q When were the candidates selected?

14 A The candidates were selected by the Socialist  
15 Labor Party at its convention in May of this year.

16 Q So you couldn't have complied with the February  
17 rule, could you?

18 A No, Your Honor, although I don't think that that  
19 rule by itself precludes us getting on the ballot because  
20 the other parties didn't nominate their candidates until  
21 August.

22 Q Who was your candidate four years ago?

23 A Who was the candidate for President four years  
24 ago?

25 Q Yes. While you are answering that, the next



1 question is: Why didn't you take that action then?

2 A This time they are Blaumen and Taylor.

3 The reason the party did not bring its suit earlier,  
4 in the documents, this is covered in the documents before  
5 the Court, and the party was anxious to test the constitu-  
6 tionality of the law some years past, but it didn't have  
7 the resources.

8 In 1946 it qualified for ballot in Ohio, and had  
9 about 30,000 signatures, to qualify its candidate for  
10 governor. It filed 45,000. What happened?

11 The Board of Elections said not enough signatures  
12 had been filed. The party had to file a mandamus action in  
13 the Ohio Supreme Court, and finally got an order and put  
14 their candidate on the ballot but that exhausted the party's  
15 resources.

16 It is a small party, and it is not an affluent  
17 party. For over a period of years it attempted to get counsel  
18 to pursue this matter and was unable to finance it, and in  
19 this case it has been brought by the Civil Liberties Union,  
20 and that is the only way it has been able to bring its action.

21 The party shows a membership of 108 in Ohio.

22 Q Aren't there many states that require more than --  
23 there are some states that have more counties than 108.

24 A I suppose there are, but there are many states  
25 where a party of 108 has no difficulty whatever in getting

1 on the ballot. In the State of Washington one hundred people  
2 can come together --

3 Q Is it your position that under the Constitution,  
4 in as large a state, a party with only 108 members is going  
5 to bring that state to the expense of printing a ballot in  
6 every county of the state?

7 A That is correct. A small political party has an  
8 absolute Constitutional right to be on the ballot unless  
9 a state can prove and can show a compelling necessity which  
10 would justify legislation which has the effect of excluding  
11 that party from the ballot.

12 The rights of the members of the small party to  
13 be on the ballot are just as important to them, and perhaps  
14 more so, than the rights of the members of a large political  
15 party. One is just as important as the other.

16 Q I understand that your position is exactly the  
17 opposite of the state. That is, that they have an absolute  
18 right to bar for any reason at all a political party. You  
19 take the position that the party has the absolute right to  
20 be put on the ballot even though it has only 108 members?

21 A We added a branch to that. If a state can prove  
22 a compelling justification --

23 Q You can't think of one of those, can you?

24 A It is hard for me, Your Honor, because we have  
25 examined the reasons that have historically been offered.

1           Q     So you really are, as Justice Black suggests,  
2 you come pretty close to claiming an absolute right to be on  
3 the ballot?

4           A     That is essentially right. We find no justification  
5 for keeping a small party off. If you are going to ask me  
6 can one person insist upon the right to be on it, no, maybe  
7 not. The requirements may be reasonable, if reasonable is  
8 nominal or minimal. But the small political party is on the  
9 ballots in many states, we have suggested a guideline.  
10 Our guideline is one-tenth of one per cent, and file this  
11 number of signatories.

12          Q     Why should there be any, if you have an absolute  
13 right?

14          A     We don't feel that we have any until it is proven  
15 that a problem is created. This Court has said time and time  
16 again, on all of the controversies before referring to  
17 voting rights, the Court has said that it will meticulously  
18 scrutinize any impairment.

19               Now, I submit if you have a small political party  
20 and it is not on the ballot, if it is not able to meet  
21 qualifications, its rights have been impaired. That is  
22 obvious.

23          Q     Mr. Gordon, we are all throwing around the word  
24 "rights."

25               I understand Ohio's argument in the previous case

1 was that the source of right it asserts, correctly or in-  
2 correctly, it cites Article II, Section 1, of the United  
3 States Constitution.

4 What source are you talking about for these rights?  
5 And I presume that you are talking about some Constitutional  
6 right?

7 A We base our rights on a number of the sections of  
8 the Constitution, but primarily on the equal protection clause  
9 of the Fourteenth Amendment. We would like to develop that.

10 Judge Kinneary in District Court said that if the  
11 Wallace Party is not placed upon the ballot, it will not  
12 have equal opportunity, and that is the electors, the people  
13 of Ohio will be treated as secondclass electors, and that  
14 is not right. And the party should therefore be placed on  
15 the ballot.

16 In the same breath he said that the Socialist  
17 Labor Party, because it is small, does not have a similar  
18 right.

19 Now, we submit that this type of philosophy is  
20 alien to basic Constitutional tenets and guarantees, and  
21 I want to illustrate an example.

22 In any other area, involving fundamental rights,  
23 this type of doctrine doesn't apply. For example, assume  
24 in a Southwest community in the Southwest part of this  
25 country a restaurant which has a policy of segregation, and

1 assume that the restaurant owner will not permit Mexican  
2 Americans or Negroes to eat in that restaurant, and a class  
3 suit is brought by representatives of both groups.

4 Now, what would this Court think if a Court said,  
5 "Well, yes, the policy denies the members of those groups  
6 equal opportunity, and it treats them as secondclass citizens,  
7 and it will not be permitted, but it will not be permitted  
8 for the Mexican Americans, because in this community they  
9 are a substantial section of the population, but on the other  
10 hand a policy will be permitted for Negro Americans because  
11 they are a small minority."

12 That is exactly what we have here.

13 Q Is that exactly what you have? You have a Constitu-  
14 tional provision against discriminating on account of race.  
15 Here you are going under the general protection and equal  
16 protection clause of the Fourteenth Amendment.

17 A I am only using Judge Kinneary's language.  
18 In his opinion, he said to deny Wallace a position on the  
19 ballot would be treating the citizens like secondclass  
20 electors and denying them equal opportunity. We agree with  
21 that.

22 We think both parties should be on the ballot. We  
23 think there is an impairment of the right of the small  
24 political party when it is kept off the ballot, and it doesn't  
25 have its name on the ballot, and we ask this question:



1 Why shouldn't it be on the ballot? The question is not  
2 should it, but why shouldn't it be co-equal with the other  
3 political parties.

4 It is done in Colorado, and it is done in New York.

5 Q Where did the political party get the "right",  
6 underscored, to be on the ballot?

7 A It derives its right from the equal protection  
8 clause of the Fourteenth Amendment. Here is a classification  
9 that is being established of a percentage, which is too high.  
10 The percentage is set not by the State of Ohio, and not by  
11 the Ohio Legislature.

12 Q You say it is one-half of one per cent, and the  
13 State says it is 15 per cent, and do you have a happy medium  
14 for us?

15 A Yes, the proposal we have is one-tenth of one per  
16 cent with a maximum of 10,000.

17 Q The State says 15 per cent, and you say that.  
18 Would you give us a happy medium?

19 A No.

20 Q Because you wouldn't qualify, is that right?

21 A That is correct.

22 Q And that is the reason you want this one figure,  
23 that just fits like a glove?

24 A No, Your Honor, we are suggesting that as a ceiling  
25 on this basis, that there is no justification and no compelling

1 necessity to keep a small party off. The other States permit  
2 the small political parties on.

3 Q Would the State be right in limiting a ballot to  
4 one hundred people? Do you think that was good?

5 A I would say this, Your Honor.

6 Q Would that be good?

7 A That would not be good. I would be opposed to  
8 any arbitrary limitation.

9 Q Do you think that that State could have a ballot  
10 with one thousand people running for President? Would the  
11 State have a right to protect itself from that?

12 A Yes, it might, if that happened, but then it would  
13 come to this Court and say they have a legitimate problem,  
14 and the ballot is just too large, and we have a bed-sheet  
15 ballot, but no one has ever developed that kind of evidence  
16 for a court. Nobody has ever shown that.

17 In the Congressional race, in the 23rd District of  
18 Ohio, we had fourteen candidates, and no one said, "Look  
19 how large this ballot is", and to qualify all you needed  
20 was one hundred signatures. That is a nominal requirement.  
21 That is okay. But if we had fourteen third parties on the  
22 ballot, the election officials would be screaming, and they  
23 would say we have to elevate a way up and bar and deprive  
24 third parties.

25 Q Have you at any time asked the State court to

1 correct this?

2 A No, we havenot, Your Honor.

3 Q Why not?

4 A Because we have more faith in Federal courts than  
5 in State courts to relieve the type of problem that this  
6 party has faced, the obliteration of its rights.

7 Q Since 1948 to date, you have never asked the State.  
8 You say the State is wrong and you have never asked the  
9 State to correct its own error?

10 A The State Legislature or the State court?

11 Q The State.

12 A The State Legislature is run by two political  
13 parties, and to them the words "third party" are anathema.  
14 They want to perpetuate the type of political power that  
15 they have enjoyed over the years.

16 Q That is not true for the courts, I am sure.

17 A The courts are much more detached, but the Federal  
18 courts we have much greater faith in their willingness to  
19 be guardians of the Constitutional rights of third political  
20 parties. There is a spirit which pervades.

21 Q Is that the reason you didn't go into the State  
22 courts?

23 A Yes, we thought there would be better opportunity  
24 for getting relief in Federal courts.

25 Q And it took you twenty years to find that out?

1           A     No, the party attempted to assert its rights over  
2 the years, but it did not have the resources. This was the  
3 major cause of its delay. Documents have been filed with  
4 this Court of reports to conventions, where the question is  
5 raised again and again, and the party did go to Court in  
6 1946, but it cost a lot of money and it didn't have that kind  
7 of resources. This is the problem of the small political  
8 party in America. It doesn't have a lot of affluence,  
9 or its members.

10          Q     They can vote in Ohio?

11          A     They can vote now. Before they were completely  
12 excluded. Now they have the write-in voting.

13          Q     You claim that the State does not have the right  
14 to say that a small group -- of how many?

15          A     There is a voting number of about three million.

16          Q     You say that it is denying them equal protection  
17 not to put them on the ballot?

18          A     Your Honor, the Socialist Labor Party with that  
19 small membership was on the ballot for 75 years. We say  
20 that the State of Ohio cannot deny anybody its rights to be  
21 on the ballot unless it shows the compelling justification.  
22 That is the document in all other phases of voting rights  
23 cases, that in order to impair -- when we talk about the  
24 segregation --

25          Q     It has to be treated in some way practicable, and

1 it is true that it could not be that each particular class  
2 has to have exactly the same treatment under all of the cir-  
3 cumstances.

4 A We do think there has to be a practical application,  
5 but the question is: What is that practical application?  
6 For the State of Washington one hundred people can meet in  
7 a convention, and the party is on the ballot.

8 In the State of New York, twelve thousand signatures  
9 can be obtained and the party is on the ballot.

10 In the State of Colorado, three hundred signatures  
11 can be obtained.

12 There is a series of States like this, where it is  
13 possible for the third political party to share on an equal  
14 basis with the other political parties in the State's electoral  
15 process.

16 Now, all of a sudden, in Ohio they have this  
17 horrendous requirement, and the State says, "We have a right,"  
18 and we say, "No, they don't have a right." If the other  
19 States can carry on in the way they have, and have a successful  
20 electoral system and make room in their process for the  
21 participation of third parties, why not Ohio, and why not  
22 the other States?

23 Q Do you rest on that extreme decision, or is there  
24 a medium? Is that your only position, or do you also argue  
25 that, assuming the State of Ohio could make reasonable



1 regulations, and reasonable classifications, can you define  
2 what is a political party to require a minimum amount of  
3 signatures, it has not done so in this instance and therefore  
4 since it has not done so in this instance is it your argument  
5 that you should declare and so order that you get a place  
6 on the ballot because the write-in position ordered by the  
7 lower court is not adequate?

8 A That is our position, Your Honor.

9 Q But, do you have to take the extreme position  
10 for which you have been arguing, or do you reach the same  
11 results along the lines I have just suggested to you?

12 A Your Honor, to be perfectly candid, while the  
13 question of placing the party on the ballot is essential,  
14 at the time our transcendent concern is this: What you  
15 refer to as an extreme position is a position which we feel  
16 ought to be urged upon the States. We are not talking about  
17 this Court legislating for the States, and only setting  
18 ceilings, but suppose that this --

19 Q I understand that, and excuse me, sir, but what  
20 I am trying to get from you is your view as to this point.  
21 Suppose that we don't go along with what I would call the  
22 extreme position, and suppose we take the position that the  
23 lower court was right in saying that the Ohio law is un-  
24 constitutional, although Ohio could make reasonable regulations  
25 and set up reasonable classifications, these are not

1 reasonable, do you see?

2 A Yes, I understand that.

3 Q Now, would it or would it not suffice for your  
4 purposes?

5 A It would suffice for our purposes for the 1968  
6 elections, because we would then argue as follows: That  
7 in the absence of any restrictions, constitutionally viable  
8 restrictions imposed by the State, the Court has no right to  
9 set up its own and to keep a political party off, and therefore  
10 the District Court should have placed the party on the  
11 ballot. So we would meet that proposition.

12 Q That is what I am trying to get to. In other words,  
13 your position would be that since by my assumption the  
14 statute is unconstitutional, this Court should not then say  
15 that one hundred members of a political party is not enough,  
16 but we should then say that all parties before us are en-  
17 titled to relief, is that correct?

18 A That is correct, Your Honor.

19 Now, that would be one branch of the argument.  
20 But the second branch is this: In the absence of guidelines,  
21 we all know what the tests are now. The tests are any statute  
22 that is going to regulate the accessibility of the ballot  
23 to third parties, as we understand it, the judicially  
24 determined test, it must meet necessity, equality and reason-  
25 ableness.

1           It is perfectly obvious there is a wide variation  
2 as to what these words mean. Your Honors have heard counsel  
3 who has said that the test can be such, almost anything the  
4 legislature decides is constitutionally permissible.

5           We don't agree.

6           Q     Do you think the legislature these days could  
7 directly choose the electors?

8           A     We are referring to the percentage of signatures  
9 that it might require. As far as choosing of the electors,  
10 we think if the legislature is going to have electors chosen  
11 by popular vote, it has to do it pursuant to the equal pro-  
12 tection clause.

13          Q     You don't think that the legislature could permit  
14 the choice to be made between A and B, instead of A, B, C,  
15 and D?

16          A     No, we do not. We think all parties have to  
17 share. If any are to be kept off, it has to be a reasonable  
18 basis and compelling necessity has to be shown, which it  
19 never has been shown, with respect to small third parties.

20                The cost, for example, of placing a small third  
21 party on the ballot is negligible. It is simply a matter  
22 of the printer setting some type. This country and the  
23 States are spending enormous sums of money on many other  
24 things of dubious value, and when it comes to election,  
25 which is the heart and soul of our constitutional system,

1 that is no time to practice economy.

2 The democratic process can't be measured in dollars  
3 and cents. The member of the small third party is taxed and  
4 his taxes flow into the public treasury, and out of the  
5 treasury come the funds to pay for the ballots. Why should  
6 he be taxed, this is a due process argument, and forced to  
7 pay for ballots which exclude his party?

8 He has just as much right to have his party on  
9 the ballot, if he can meet minimal standards, as the large  
10 parties. Just as the small minority has just as much right  
11 to have protection against segregation laws as the large  
12 minority. There is an invidious discrimination, and we  
13 again urge, and again repeat that in state after state it is  
14 possible for third political parties to be on the ballot.

15 We are concerned with what Ohio is going to do.  
16 The third parties are anathema. The legislature is going to  
17 go back, and if this 15 per cent requirement is knocked out,  
18 they will consider what is the next highest one we can set.  
19 We don't want a multiplicity of suits. We would like to  
20 have the matter settled.

21 The guidelines of necessity, equality and dis-  
22 crimination are not precise enough, and we would hope and  
23 urge that the Court would develop clearer guidelines which  
24 would preclude arbitrary action.

25 Q Where do we get these guidelines, from the

1 District Court?

2 A The District Court, based on Reynolds versus Sims,  
3 and this language flows from these cases. This Court has  
4 said again and again that any impairment of voting rights,  
5 and being on the ballot is a correlative right to voting --

6 Q These cases had nothing to do with parties on the  
7 ballot.

8 A No, but it had to do with voting rights.

9 Q And it had nothing to do with the electoral  
10 college?

11 A No, but it is in the area of voting rights, and  
12 it says in voting rights, whenever there is any impairment  
13 or infringement, it cannot be constitutionally warranted  
14 unless necessity is shown. We recorded those cases in our  
15 brief, and this Court has said that any impairment has to be  
16 meticulously scrutinized.

17 Well now, if other States are able to have election  
18 laws which permit third party participation, then we have  
19 to meticulously scrutinize those States which impose higher  
20 restrictions because what is happening is this: These  
21 legislators are precluding competition. They are setting  
22 standards so high that third parties and independents cannot  
23 compete, not because of their fear of these parties but  
24 because of the split in votes.

25 I would like to reserve time.



1 Q Mr. Gordon, did you represent to us that Cuyahoga  
2 County, that is Cleveland, has printed a ballot with the  
3 Socialist Party name on it, and your candidates on it,  
4 subject to this Court's decision?

5 A No, what they have done is reserve space, so that,  
6 if this Court should decide, placing candidates on the  
7 ballot, then it will be no particular problem in that county.

8 Q They have the machines programmed, and in those  
9 precincts where they are using paper ballots they don't  
10 have them printed?

11 A No, but there is time.

12 Q You are talking about time for printing. There  
13 is also the matter of getting ballots over to Southeast  
14 Asia, and back, and into the hospitals around the country  
15 for sick absentee voters, and various other considerations,  
16 in addition to printing?

17 A That is correct, Your Honor, and we have stated in  
18 our final brief filed with the Court, that the absentee  
19 ballots may have arrived at a point of no return. But if  
20 this Court should decide to put the Socialist Labor Party  
21 on the ballot, the only ones injured by not having them,  
22 will be the party itself, and it will gladly waive any  
23 problems having to do with absentee ballots.

24 The Secretary of State has announced that Wallace's  
25 name is going to be on the absentee ballot and will stay on

1 regardless of any future decision of this Court, and by the  
2 same token, if that is the case, it is possible that ballots  
3 would be different.

4 Q There are other people interested besides the  
5 particular members of your party.

6 A There is nothing that can be done at this point.  
7 You talk to the director of the board of elections, and  
8 probably it cannot be resolved. That is speaking only of  
9 the absentee ballots, so we have no choice.

10 Q I suppose there are hundreds of times as many  
11 members in the armed forces overseas as you have members  
12 of your party, aren't there?

13 A Well ---

14 Q You must have many thousands of members of the  
15 armed forces overseas. Are you going to deprive them of  
16 their vote?

17 A No, they would all have the right to vote for the  
18 Socialist Labor Party by the write-in.

19 Q Well, they have that now.

20 A They have that now. They are going to use paper  
21 ballots. All absentee ballots are paper ballots, so they  
22 will all have the right. If the Court should put the Socialist  
23 Labor candidates on the ballot, that could be done.

24 Q Why can't all of you vote through the same  
25 facility?

1           A     Because many have to vote by virtue of voting  
2 machines, and as we have shown you, and as counsel for  
3 Mr. Wallace has pointed out, there are all kinds of problems  
4 of casting ballots that way.

5           That is what we mean by an invidious discrimination.  
6 It is a dizeable difference between having to depend on the  
7 write-in vote, all of the complexities of a voting machine,  
8 and simply casting a vote. They are not the same. The race  
9 is not the same. One party is given a lead from the others,  
10 and it is not equality of opportunity.

11          Q     Don't you have that same inequality in all write-  
12 ins for all offices in your State? There is a place for  
13 write-ins, and doesn't Wallace have the same inequality?

14          A     There is that, Your Honor, but that is why a  
15 political party which consistently runs candidates should not  
16 be deprived of equal opportunity with the other parties.

17          Now, if you have some individual who, for example,  
18 did not file his nominating petition in time, and then  
19 depends upon a write-in vote, there will be an inequality  
20 there, but it is not a serious matter, and it was his fault.  
21 It is a one-time proposition.

22          There is an inequality, but he has a chance. But  
23 for a political party which regularly goes to the polls,  
24 certainly it should have as much opportunity as the larger  
25 party.

1           We don't have this discrimination in other areas  
2 of the law relating to fundamental freedoms, and we should  
3 not have it in the political field either, which is probably  
4 the touchstone of the other freedoms.

5           MR. CHIEF JUSTICE WARREN: You may have five  
6 minutes more.

7           ORAL ARGUMENT OF CHARLES S. LOPEMAN, ESQ.

8           ON BEHALF OF APPELLEES

9           MR. LOPEMAN: May it please the Court, the appellants  
10 request here relief which was not requested in the courts  
11 below. This is the first time that a request has been made  
12 for an order directing a State official to put the names of  
13 the Socialist Labor Party candidates on the ballot.

14          Q     It was not raised at all in the courts below?

15          A     That is right. It was not part of the prayer  
16 of the complaint, and the complaint has not been amended.

17          Q     Mr. Lopeman, didn't the court below treat it as  
18 a case where that relief was sought?

19          A     No, the court below treated the cases, the Williams  
20 case, and this case, together for decision, but the cases  
21 have maintained a separate identity.

22          Q     That is not my question. I haven't read that opinion  
23 for some time, but I thought the court below treated the  
24 application of the Socialist Labor Party as also asking for  
25 ballot position. Am I wrong about that?

1           A     I think that you are, yes, Your Honor. I do not  
2 believe that the Court did treat it that way. It is clear  
3 they did not seek it.

4           Q     You may be right.

5           Q     I went into this pretty carefully some time ago,  
6 and I think it was ambiguous as to what they asked, to recite  
7 in the body of their complaint their desire to get such  
8 relief. I will agree with you that their prayer is not  
9 very clear. I don't have it in front of me, but as I finally  
10 understood it, it was a constitutional prayer.

11           They asked first that the legislature be given an  
12 opportunity to do something about this, and then they said  
13 that if the legislature fails to act, then we ask the Court  
14 to give us ballot relief.

15           A     If I may clarify, Your Honor, the prayer requested  
16 the legislature to act, and if the Court did not act and if  
17 the legislature did not act, they asked the court to de-  
18 clare Section 3517.01 of the revised code, which contains  
19 the 15 per cent requirement, be held invalid.

20           But there was no request for the specific injunction  
21 relief of having names physically put on ballots and machines  
22 which is initially asked for in this Court.

23           Q     What about the practical problems?

24           A     As a practical matter, it is impossible at this  
25 time for the State of Ohio to comply with an order granting



1 a requested relief.

2 Mr. Gordon has apparently canvassed ten boards of  
3 elections, and he mentions Cuyahoga County, and he did not  
4 mention that he checked Franklin County where he was advised  
5 it was an impossibility. I have asked the Secretary of  
6 State if it would be possible. He has advised me that it  
7 would be impossible.

8 Nothing this Court can do short of setting back the  
9 election date can result in appellants' getting the relief  
10 they request.

11 Further, we feel that the arguments presented by  
12 this appeal are the same as the arguments and questions  
13 presented by the appeal in Williams v. Rhodes and, therefore,  
14 since whole argument has been made, we do not wish to make  
15 any further argument at this time.

16 We would respectfully request this Court to affirm  
17 the decision of the United States District Court.

18 Q Could I ask you a question?

19 Is there any provision in the Ohio election  
20 law governing the size of the party, as distinct from the  
21 number of petitions?

22 A Yes; Section 3517.01 provides that a party will  
23 continue on the ballot as long as it gets 10 per cent of the  
24 popular vote for governor, or in the alternative, 15 per cent  
25 requirement of signatures on the petition.

1 Q That is a distinction as party members. The fact  
2 that the party has 108 members; and if it had 15 per cent of  
3 the vote, it would have gotten on the ballot.

4 A That is correct.

5 Q I understood in the previous case, the Wallace  
6 case, that your position was that the statutes and the Ohio  
7 procedures were lawful and constitutional.

8 A That is correct, Your Honor.

9 Q Now here you are asking us to affirm the decision  
10 below, but here the District Court held that the Ohio pro-  
11 cedures were unlawful or unconstitutional.

12 A The State is asking only that this Court affirm  
13 the order of the District Court.

14 Q We can't affirm the order without affirming the  
15 reason for it, can we? I don't understand your position.  
16 If we affirm the order of the District Court in the Socialist  
17 Labor Party case, doesn't that mean that we concur with the  
18 view or with the conclusion that the Ohio statute procedures  
19 are unlawful, which means unconstitutional, because the  
20 District Court gave the party relief? It was relief on the  
21 write-in, requiring that there be a write-in.

22 They are asking for additional relief now.  
23 Is it your position that we can affirm the District Court  
24 without concurring in the conclusion that the Ohio statute  
25 and procedures are unlawful?

1           A     Yes, Your Honor. We would ask the Court to  
2 refuse the requested further relief and affirm the order  
3 which denied relief. We would request this Court to affirm  
4 the denial of relief by the District Court.

5           Q     But the District Court granted relief here.  
6 The District Court ordered that space be provided on the  
7 Ohio ballot for a write-in for the Socialist Labor Party  
8 and its candidates. Am I right about that?

9           A     That is correct, Your Honor, and the State has not  
10 appealed that.

11          Q     You haven't taken an appeal from that? I suppose  
12 in strict logic your position is that you could have, but  
13 you haven't.

14          A     That is correct. We feel that there is no consti-  
15 tutional requirement of write-in voting for presidential  
16 electors, but we did not appeal.

17          Q     So you are asking us to affirm the District Court's  
18 order refusing to give party designation, and not for the  
19 reasons that the District Court said, necessarily, but also  
20 for the reason that the District Court was wrong about the  
21 unconstitutionality of the Ohio statute?

22          A     That is correct.

23          Q     Is that it?

24          A     Yes.

25          Q     Did you refer to 3705.01?

1           A     I believe that is appended to our motion in the  
2 Williams case. It is 3517.01.

3           Q     What would that do?

4           A     That is a definition section in which a definition  
5 of a political party is set out. It requires first that a  
6 political party is one which obtained 10 per cent of the  
7 total vote for its candidate for governor in the last  
8 election, or one which presents to the Secretary of State  
9 a qualifying petition signed by 15 per cent of those who  
10 voted in the last gubernatorial election.

11          Q     And then the other section was the one that  
12 authorizes a group of people who have become known as a  
13 political party, if they get 15 per cent of the vote?

14          A     No, that is this section.

15          Q     Is that the same one?

16          A     It is all part of the same section.

17                Thank you.

18                MR. CHIEF JUSTICE WARREN: Mr. Gordon.

1 REBUTTAL ARGUMENT OF JERRY GORDON, ESQ.

2 MR. GORDON: May it please the Court, I would like  
3 to first again emphasize that the Socialist Labor Party,  
4 small though it was, and is, was on the ballot many, many  
5 times in the course of Ohio's history.

6 Documents have been submitted to the Court.  
7 What we actually ask is that the party's rights be restored  
8 that were taken from it, and we would like to emphasize that  
9 in many other areas of voting rights, due primarily to the  
10 contributions of this Court, there has been great advance  
11 and progress.

12 Rights have been given to Negroes to vote and to  
13 women to vote, and you have had the reapportionment case.

14 Q I believe the Court is aware of all of that.

15 A Because there were many other cases, such as  
16 Louisiana v. The United States, where the right was circum-  
17 scribed in the manner in which it was implemented, and the  
18 Court has struck that down.

19 In that case, incidentally, the Court said that  
20 a decree should not only eliminate the discrimination which  
21 had existed up to that point, but to prevent future dis-  
22 crimination as well.

23 This is the type of decree we seek, because other-  
24 wise we are going to go back and go through the same  
25 experience which we have had before.



1           We consider it inevitable, and the Court has seen  
2 the resistance. We ask for a restoration of these rights.

3           In the year 1908 in Ohio, the Democratic candidate  
4 for Governor of Ohio got a half million votes, the Republican  
5 got about the same, and the Socialist Labor Party got 797.  
6 It was on the ballot.

7           We know in other areas of fundamental rights such  
8 as the First Amendment, a speaker who addresses a small  
9 crowd is permitted to speak just as is the speaker who  
10 addresses the large crowd. It would never be suggested  
11 the rights can be circumscribed, in the words of *Terminal v.*  
12 *Chicago*, "To circumscribe those rights you would have to  
13 show a clear and present danger of a present evil that rises  
14 far above public inconvenience."

15           All that we are told is that there is a certain  
16 inconvenience to have a small party on the ballot. That is  
17 not a reason to deny the right of that party to compete on  
18 an equal basis with the larger political parties.

19           What we ask most of all is for some guidelines to  
20 the State, to prevent a repetition of the experience that  
21 this party has gone through, where it went for decades en-  
22 joying ballot status, and now it is denied that status.

23           We believe that the guidelines should be that  
24 States can regulate the accessibility of the ballot to  
25 third parties but not more than is absolutely necessary,

1 if this can be spelled out with some greater clarity and  
2 precision than it has been before, this would certainly  
3 advance the cause of participatory democracy and the right  
4 of small groups to participate.

5 We have today many small groups in this society  
6 who feel strongly, and have burning feelings about issues,  
7 and are capable of causing substantial disruption. Do we  
8 want to channel the discontent and the dissent into the  
9 electoral process? I say we do. But if we are going to say  
10 to those groups, "Yes, if you are not satisfied with our  
11 institutions the way to express your dissent is through the  
12 political parties but do it through either the Republican  
13 Party or Democratic Party", we are not going to channel the  
14 discontent. They are not going to participate on that  
15 basis.

16 They should be encouraged to form their own political  
17 groups, and it should not be prohibitive, and the require-  
18 ment should be minimal, so that it is easy for them to  
19 participate in the political process.

20 We think this is a very important policy considera-  
21 tion which should inspire the Court to make accessibility  
22 of the ballot easy, and to encourage groups to participate  
23 in this area.

24 Finally, we don't think that what we feel to be  
25 an invidious discrimination of the small versus the large

1 should be dignified by excluding the Socialist Labor Party  
2 from the ballot in the November 1968 elections, because it  
3 would be saying in effect, this has been the main rationale,  
4 in the District Court and in this Court's decision granting  
5 temporary relief. While it pointed out there had been delay,  
6 what has the Court said about the small size of the party?

7 We hope this Court would not dignify a position  
8 which says the larger groups shall enjoy these rights, but  
9 the smaller groups can't.

10 Q Mr. Gordon, what do you say to the representation,  
11 professional representation by the representative of the  
12 Attorney General of Ohio that it is now simply an impossibility  
13 to give you the relief you ask for in 1968? I am not talking  
14 about your laches, perhaps it is all my fault, but we are  
15 dealing with a fact as he represents it to us.

16 A We did call Franklin County and we included that  
17 in the brief we filed with the Court on Saturday, and we  
18 were never told it was impossible. We talked with the  
19 printing company, and he did indicate some very large prob-  
20 lems as far as printing these strips for voting machines,  
21 and there is no question about it, and it may be that they  
22 wouldn't have time, although he said probably some other  
23 printers could do it.

24 But we say, and we make this categorical statement,  
25 there is time to print paper ballots in every county of the

1 State, and there is no question about that. In Franklin  
2 County as well as elsewhere, we have plenty of time to do  
3 that, if Members of this Court were prepared to make such  
4 an order as MacDougall v. Green, where it was twelve days  
5 before the election; and Cuyahoga County hasn't started  
6 making its paper ballots.

7 Q At the very least then you would require these  
8 counties that vote by voting machines to turn to paper  
9 ballots to satisfy the relief you ask?

10 A We would say if that is necessary, it should be  
11 done. It is that important to tell the people of Ohio --  
12 we have seen these two cases come up together from the very  
13 inception, and in our case it is the senior case -- it is  
14 that important to tell the people of Ohio that both groups  
15 shall be given relief and not one or the other. We would  
16 favor both groups on the ballot, and if there is a certain  
17 disruption of the electoral process, that is a small price  
18 to pay for democracy. That is a small price to pay.

19 Q For total disruption of the electoral process in  
20 Ohio?

21 A No. We stated in our brief, if we sought relief  
22 now, obviously we wouldn't expect much response from the  
23 Court, but in view of the fact that there is time --

24 Q It has been represented to us professionally as  
25 a fact that there is not time, and it is impossible to do.

1           A     I would hope the Court would take judicial notice  
2 of the fact that there is time to print ballots in 29 days,  
3 to print paper ballots in the State of Ohio.

4           Q     And get them over to Vietnam?

5           A     Not the absentee ballots.

6           Q     Or get them back in time to be counted as absentee  
7 ballots?

8           A     No, because the absentee ballots should go out as  
9 they are, and there is not time on those.

10          Q     All of these thousands of veterans would be dis-  
11 enfranchised in the situation unless they followed another  
12 procedure from the one that is in existence in Ohio.

13          A     They could write in, and the write-in is no big  
14 problem with paper ballots, and that is what they have.  
15 They will be able to write in the names of the candidates  
16 which they can do anyway.

17          Q     Let me ask you this, Mr. Gordon. You have two  
18 prongs to your case, and one of them is that the statutes  
19 are unconstitutional. The other is that you want some tempo-  
20 rary relief. Now, if the Court should determine that these  
21 statutes are unconstitutional but that it is too late to  
22 afford you the remedy that you ask for, wouldn't you win  
23 this case? Wouldn't the major thrust of your argument be  
24 satisfied, and wouldn't you win for all practical purposes?

25          A     Your Honor, we will only win this case if this



1 Court takes steps to preclude a recurrence of the experience  
2 that we have had in Ohio, where the rights of this party  
3 were obliterated; only if guidelines are established that  
4 will establish ceilings on the Ohio legislature, because  
5 otherwise it is just inevitable, as the day follows the night,  
6 that we will be back in court in 1969 again challenging the  
7 new statutes which they pass.

8 Q And that is no matter how late you come to this  
9 Court, you had twenty years that you could have tested this  
10 if you wanted to, as a national party, because you have  
11 been a national party for twenty years. But you think that  
12 regardless of the exigencies of this situation that you  
13 can come in just as late as you want, and without regard to  
14 the disruption of the election process, you can say to us,  
15 "In order to do your duty, you have to give us temporary  
16 relief"?

17 A We say this, Your Honor, that the temporary relief  
18 was granted to the Wallace group on September 10. We got  
19 the order on September 11, and we immediately asked the  
20 Secretary of State to place the Socialist Labor Party on  
21 the ballot, and he declined. We gave him notice of the  
22 filing of the motion.

23 Q We didn't say that that was going to be final,  
24 and that was a temporary relief that can be changed by the  
25 judgment of this Court.

1           A     That is correct, but the point is that there is  
2 still time, and this we think is the crucial question. We  
3 recognize this, that this Court has to weigh the competing  
4 equities, and one thing it is going to take into considera-  
5 tion is the printing of the ballots.

6           All we are saying is that the factors on the  
7 other side outweigh this consideration, and the factors are  
8 these: That a small group, the rights of a small group  
9 should be respected to the same extent as the large group,  
10 and as long as it is still possible for that small group  
11 to have a place on the ballot, it should be placed on the  
12 ballot.

13           This would dramatize, by placing the Socialist  
14 Labor Party on the ballot, the Court's adherence to that  
15 basic principle. We think the language in the opinion  
16 which says that when you have to rely on write-in voting  
17 and you are not on the ballot, that makes you a secondclass  
18 elector --

19           Q     If you had filed this case on the exact same time  
20 in 1964, and this Court had decided exactly what the  
21 Chief Justice's suggestion is here, you wouldn't be here today,  
22 would you?

23           A     That is correct, Your Honor, but --

24           Q     Isn't it that simple, that you waited around?

25           A     Well, the party didn't wait around. The documents

1 that it filed with this Court showed that year after year it  
2 was trying to get relief, but it didn't have the resources  
3 to finance this type of legal challenge. The party wasn't  
4 waiting around. We have this problem in our society. People  
5 do not assert their rights because they are unable to, and  
6 it was only because the American Civil Liberties Union took  
7 this case up that the case is here today.

8 Q The American Civil Liberties Union has been around  
9 a few years, too.

10 A There was admittedly some delay. We recognize  
11 this is a factor that the Court is going to weigh, but there  
12 are these other factors which are important. We think it is  
13 a grave tragedy. We are not anticipating what this Court  
14 is going to do, and we know better than that, but our position  
15 is all parties should be on the ballot, that if the ballot  
16 is going to be open, the time to do it is now and not later.

17 I don't want to treat any further this question  
18 of whether we raised this in the court below because we  
19 documented it in the papers we have filed. The prayer  
20 could have been clearer. But we have documented it in a  
21 brief we filed Saturday, that we did request this relief  
22 and the District Court did say that the main objective of  
23 both cases is for ballot status.

24 We think this question is so important that you  
25 cannot impair rights of small groups without showing a

1 compelling necessity, and it never has been shown. Therefore,  
2 the Socialist Labor Party, like the Democrats and Republicans,  
3 should enjoy equal rights, and this is an election race,  
4 the racers should start at the same place.

5 Thank you very much.

6 (Whereupon, at 2:15 p.m., oral argument in the  
7 above-entitled matter was concluded.)  
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