Supreme Court of the United States

OCTOBER TERM, 1968

In the Matter of:

Docket No. 620

JAMES L. MOORE, et al.,

Appellants;

vs.

SAMUEL SHAPIRO, Individually and as Governor of the State of Illinois, et al.

Appellees.

Place Washington, D. C.

Date March 27, 1969

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C O N T E N T S

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Washington, D. C.
Thursday, March 27, 1969

The above-entitled matter came on for argument at 12:45 p.m.

BEFORE:

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

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 620, James L. Moore, et al., appellant; versus Samuel Shapiro, individually and as Governor of the State of Illinois, et al.

Mr. Watt.

ARGUMENT OF RICHARD F. WATT, ESQ.

ON BEHALF OF APPELLANTS

MR. WATT: If the Court please, somewhat over 20 years ago I appeared before this Court and argued the case of MadDougall versus Green in which an effort was being made to have declared unconstitutional a statute of the State of Illinois with regard to the right of new parties to a place on the general election ballot for statewide candidates.

In that case, which was decided by this Court on October 21, 1948, a majority of the Court held in a pro curiam opinion that the particular statute involved was constitutional as a reasonable exercise of the State's power, and specifically it held that it was proper for purposes of the requirements of a new party getting on the ballot that the State could require 25,000 signatures, of which there must be not less than 200 signatures from at least 50 different counties.

In the State of Illinois there are 102 counties, and the population facts which were set out in the opinion then are substantially the same as they are now except that the disparity between the more populous counties of Illinois and the less

populous counties has somewhat increased.

We have here before this Court today virtually the same statute, not on behalf of a new party, but on behalf of independent candidates who sought to have themselves placed on the general election ballot as candidates for positions of electors of President and Vice President of the United States in the last general election.

We are asking this Court now to re-examine MacDougall versus Green and to determine that it should be overruled.

The issue is precisely the same: Is it proper for a State, as a condition of candidates getting on the ballot who are not the candidates of one of the established political parties, is it permissible for the State to impose, in addition to numerical standards, is it permissible that the State require that the number of voters who signify their determination to put candidates on the ballots must be distributed in a certain fashion throughout the State, based on where those voters reside.

Q This is the precise statute that was before the Court in MacDougall against Green, is it not?

A The wording is the same, Your Honor. The only difference is that there it was Section 10.2 of the Illinois Election Code, which dealt with new parties, and here it is Section 10.3, which deals with independent candidates. Otherwise, it is precisely the same.

Q The same statutory provisions as that one, identically.

A Yes, it is.

Q Well, I suppose you would agree that the answer to that question might be different, depending upon the nature of the geographical distribution required, so that if that is so, we don't have before us merely the small proposition that you have now stated, but may we not also, or alternatively, have before us that proposition in the context of the fact that here you have such a tremendous disparity; that is to say, only about 6.6 percent of the Illinois registered voters reside in 53 of the counties. Is that correct?

A That is correct.

Q I assume that you are not saying that we have to base our decision solely on the abstraction that you put to us a moment ago.

A I think that is correct, Your Honor. I would say this: In the dissent that Mr. Justice Douglas wrote in MacDougall versus Green, there is the suggestion that it might be permissible to require a distribution of signatures, provided that the distribution was proportionate to the population of the geographic areas involved.

So I suppose you could state that if 25,000 signatures were required, it would be permissible for the State at that point to say those 25,000 signatures must be distributed throughout the State in proportion to the voting population of the various counties. That particular issue is not here. That is correct.

Q Well, what is here, though, is that there is this question in the specific context of the demographic facts in the State of Illinois, the distribution of people among the counties. Here you could get, let's see, over 90 percent of the voters of the State and still not comply with that statute.

A That is correct. You could not get candidates on the ballot under those circumstances.

Q You might have another State in which a statute of this sort might work without that rather startling consequence if you had the population distributed more or less equally among the requisite number of counties.

A That is correct, but I think I would interpret this Court's decision in Reynolds versus Simms as indicating that absent some remarkable showing of the purpose of geographic distribution of voters, that if the unit with respect to which the candidates are concerned, let us say statewide, that then the validity and effect of a voter's indication of his intent should have nothing to do with where he lives.

Since we elect, in Illinois, the candidates for statewide office on a statewide basis, it would seem to me there is a good reason for arguing that if you began imposing even some geographic distribution proportionate to population as a condition of putting the candidates on the ballot, this might well, in itself, be invalid procedure.

Q I understand your position, I think. You want to

go for broke, or more or less to go for broke, on the straight numerical basis, but I assume you do agree that there is at least a theoretical possibility and alternative which is tied to the rather striking facts in the State of Illinois with respect to the unequal distribution of population.

A I would agree with that, Your Honor. I think to a certain extent the Court has already, in some of its decisions, as you describe it, "gone for broke" insofar as it has indicated the irrelevancy of geographic location of where a voter happens to live.

It makes no difference, it should make no difference, how much his vote counts, depending on whether he lives in a small county or a large county.

Q Of course, those cases arose under the equal protection clause. The constitutional context of this case is not the protection clause, is it? It is Article II, or whatever it is. It is Presidential Electors, isn't it?

A That is correct.

Q Where you have a specific provision in the Constitution that deals with that.

A But there is no requirement in the Constitution as to manner in which States shall provide for the nomination of Presidential Electors.

Q Well, Mr. Watt, does this statute apply only to Presidential Electors?

A No, it does not.

Q All statewide offices, isn't it?

A All statewide offices. The only reason that we are here concerned only with Presidential Electors is because the petitions which were filed were simply petitions for the nomination of 26 Presidential Electors from the State of Illinois.

Q All I am getting at, your submission is that we have a broader problem here than just that which relates to the choice of Presidential Electors.

A It affects all independent candidates for statewide office in the State of Illinois, and that would be United States Senator, Governor, Lieutenant Governor, and so on.

Q Well, is your basic argument that 25,000 signatures should suffice, wherever the 25,000 happen to live?

A That is correct. I would not say that the State could not impose a different numerical total as a proper condition for getting on the ballot, and the statute prior to 1935 in Illinois simply required the total of 25,000. There was an amendment in 1935 which added the geographical distribution.

Q I understand, and you just say the geographical addition is unconstitutional.

A Correct, in violation of the equal protection, and basically in line with the dissenting opinion Mr. Justice Douglas wrote in MacDougall versus Green, and that view, at least as we see it, has been adopted by this Court in Reynolds versus

Simms, and subsequent cases.

The decision below was based substantially upon the binding effect of MacDougall versus Green. The three-judge court which heard the matter took the position that if MacDougall versus Green was to be viewed as no longer the law, that it should not be the task of the three-judge court to make that decision.

In our argument before the three-judge court by briefs, we contended that Reynolds versus Simms has substantially undercut the theory by which this Court, in MacDougall versus Green, upheld the statutory requirement.

The view of this Court at that time was that it was perfectly permissible for a State, as a condition of permitting candidates on the ballot by nomination petition, to show that those candidates had support which was not confined to one geographic area.

As Mr. Justice Fortas pointed out, the population statistics of Illinois are really rather startling. Well over 50 percent of the registered voters reside in one county, Cook County. Well over 60 percent reside in the five most populous counties, and the 49 most populous counties have approximately 93.6 percent of the registered voters, which means that any combination of voters, no matter how you distribute them, from those 49 counties, could not, under this statute, put independent candidates or new party candidates on the ballot. They would have to have signatures from additional counties.

One of the necessary effects of this -- and I think anybody who has ever had anything to do with nomination petitions in which signatures are required -- it is always desirable when you file petitions to have a surplus of signatures. It may turn out that some of the people who sign think that they are registered voters when, in fact, they are not. It may turn out that some individuals have moved from one residence to another and that their registered voting residence is different from what they put on the petition.

It may be that some signatures are illegible and, consequently, you cannot be absolutely certain that if you just file 25,000 that you will have a sufficient number of valid signatures. Consequently, anyone preparing petitions of this kind would naturally want to have some margin.

But you could have any size of margin of additional signatures from Cook County or any one of 49 other counties, and none of those signatures would be sufficient to put you over the top, so to speak. Now, you could have hundreds of thousands of signatures and, in effect, those additional signatures would not count, so that at a certain point an individual from Cook County who signs a petition of this kind is, in effect, having his signature simply disregarded because it is irrelevant to the requirement and it will not count, so to speak, to offset the lack of signatures from any of the other counties.

It seems to me under those circumstances that you have

essentially the same kind of problem as this Court has concerned itself with where you have gross malapportionment. The effective weight of one voter's indication of his position, whether by signing a nomination petition or by voting, really depends upon where he lives. If he lives in a small county, it will count; if he lives in a large county, it may not count at all.

As we read Reynolds versus Simms, this Court has determined as a general principle that the weight of a citizen's vote cannot be made to depend upon where he lives.

Q Did the Reynolds against Simms opinion of the Court deal with the MacDougall case, do you remember?

A The MacDougall case is cited in Footnote 40, Mr. Justice Douglas' dissent is cited, and the only way I can describe it, it seems to me that the principles set out by Mr. Justice Douglas' dissent are cited approvingly by the majority of this Court in Reynolds versus Simms.

Q And that was the extent of the treatment of MacDougall versus Green.

A That was the extent of the treatment of the decision itself.

Q Because I seem to remember in Baker against Carr there was more extensive treatment.

A There was a discussion of the significance of MacDougall versus Green insofar as it possibly was the first case of this kind of political problem in which the Court decided

the issue on the merits, rather than simply saying that this was the kind of political thicketing to which the Court would not go. So in 1948 I think it is fair to say MacDougall versus Green decided the issue on the merits, and did not take the "out" of considering it as non-justicable.

Q So what do you do with the Dusch case?

A I think that is different in this sense, Your Honor --

Q There the requirement was that a candidate had to live in a certain district, so there was a geographical qualification on the candidate himself.

A That is correct. But they were elected at large by the votes of all the citizens who were eligible to vote overall in the community, even though the candidates -- there had to be candidates geographically spaced, so to speak -- the effect of a voter's vote had nothing to do with where he happened to live.

Q Here it is not the candidate, but his supporters who have to live certain places, and unless they live in certain places he can't even get on the ballot; is that it?

A That is correct.

Now, as I understand the position taken by the State of Illinois in asking that this decision of the court below be affirmed, it is essentially, first, that we really don't have an election here; that in Illinois, Presidential Electors get on

the ballot, so far as established parties are concerned, by the action of State conventions and, therefore, there is nothing in the nature of a primary to get them on the ballot. They are placed on the ballot by virtue of official action of a State convention.

Secondly, that here we are concerned with nomination petitions, and not the equivalent of an election. It seems to me that argument simply cannot stand because the question is whether or not the procedure is an essential and integral part of the election process. However an individual gets officially on the ballot under a statutory scheme, that statutory scheme is part of the election machinery. If it is by nomination petition or if it is by primary election, it seems to me the standard should be precisely the same; namely, what is the effect of a voter doing something?

It cannot seem logical to me, at least, that he must have his vote counted regardless of where he lives, and his vote must count equally with the vote of every other voter, if it is a primary election that is concerned, but that it is perfectly all right to discriminate against him and weight the votes of some individuals when what you are counting are signatures on a nominationpetition.

It seems to me that the process is essentially part of the election machinery and it should meet the same standards.

The second argument that the State makes is that

somehow or other what we are seeking would interfere with the scheme for independent candidates and new party candidates. I really don't understand that argument because, as I suggested a moment before, the original requirement in Illinois prior to 1935 was simply 25,000 signatures, regardless of where they came from in the State, and the only effect of a decision here determining the unconstitutionality of the amendment would, as has been determined by many Illinois cases, leave the underlying statute intact and, therefore, if this amendment were determined to be unconstitutional, the underlying statutory scheme of 25,000 signatures for statewide candidates would continue as a perfectly valid enactment of the State Legislature.

But we do not think that a decision by this Court in any respect would interfere with a perfectly understandable and valid procedure, and that the only effect of the Court's decision overruling MacDougall versus Green would be to eliminate an unconstitutional restriction upon the nomination process by petition.

So we would ask this Court to do what we think the Court, in effect, has already done; that is, by its decisions in such cases as Gray versus Sanders, and Reynolds versus Simms, to recognize that this kind of geographic requirement which has the necessary effect of giving more weight to one voter's influence than to another's, should be considered unconstitutional, regardless of whether all we are concerned with is a nomination

process by petition, inasmuch as the petitions are an essential means for new party and independent party candidates to get on the ballot.

I have no further argument, Mr. Chief Justice. Thank you.

MR. CHIEF JUSTICE WARREN: Mr. O'Toole.

ARGUMENT OF JOHN J. O'TOOLE, ESQ.

ON BEHALF OF APPELLEES

MR. O'TOOLE: Mr. Chief Justice, and may it please the Court:

At the outset I would like to thank the Court for your permission in granting us leave to present two counsel, and I would like to further elaborate and say that this reason we did so request, even though the rule is quite clear, is because Mr. Richard Friedman has been working very closely with election laws for many, many years in the State of Illinois and perhaps his presence here will be helpful to the Court on some questions.

Basically, what we have here is what we think is a very reasonable and workable method for allowing individuals and new political parties to gain a position on the ballot in the State of Illinois.

We have an attack on our statutory method of doing so based upon what we think is an unwarranted application of one-man/one-vote.

Essentially, counsel was very correct in that, although

this case merely reflects specifically as to electors, it does affect our entire nominating procedure in the State of Illinois.

As Mr. Justice Harlan referred to, Article II, Section 1, Clause 2 of our Constitution permits the State Legislatures to set up nominating provisions for electors. Pursuant to that grant of power, and the residual powers that our Legislature had, we have set up a system whereby any existing political party who has garnered five percent of the vote in the last general election can nominate, by party convention, its electors or other State officials to be elected.

We also have a provision for new political parties to gain a place on the ballot -- not in the primary -- but in the actual ballot by obtaining 25,000 signatures, 200 of which must be from at least 50 different counties, approixmately 50 percent of our counties. We have the same provision for individual candidates seeking a place on the ballot on the general election, not on a primary election.

In MacDougall versus Green, this Court sanctioned -- in fact, approved -- our use and method of allowing individuals and new parties to gain a place on the ballot. MacDougall versus Green has been cited since its decision 20 years ago mainly for the proposition that it was the first case which said "We, the Federal Court, will decide these political issues in relation to elections," which they had previously not taken jurisdiction of

Q Couldn't the people of Cook County, through the control of a party, nominate a candidate for the general election?

A Could the people of Cook County place someone on the ballot for a statewide election? Under our present Election Code, no.

Q Through the party?

A Through the party? No, because through an established party, the established party can only place an individual on the ballot at a party convention.

Q Yes.

A In a party convention.

Q Don't you have some rules in your State which --

A Yes, we do. We have a Cook County Democratic Party, a Cook County Republican Party, we have a Democratic and Republican Party in each of the 101 other counties.

Q What does it take in a statewide convention of the Democratic Party in Illinois for a man to be nominated as a candidate of that party?

A I think I am correct on this. Mr. Friedman can correct me if I am wrong. The party convention is made up of a representative from each of the 102 counties. At this --

Q Just one candidate from every county?

A One county chairman.

Q Does that comprise your State convention?

A There are 101 counties.

Q Yes, 101 people will be in the State convention.

A But the individual delegation from a county, and it might be more than one, carries weighted voting depending upon the amount of votes that that party --

Q Let us assume that an issue comes up in the State convention and you have a vote in the State convention, and all the Cook County representatives vote the same way. Will Cook County representation carry the State convention?

A I would venture to say at the present time yes, because I believe more than half of the Democratic votes in the last general election were from Cook County.

Q So Cook County obviously itself can get a candidate on the primary ballot.

A A Democrat.

Q Yes, I understand that, a Democrat on the primary ballot.

A Yes, sir.

No, no. Not on the primary. On the general. We do not have a primary if there are no contested offices.

Q Well, I know, but how many votes does it take to get a person on the primary ballot through the convention. If you get enough votes in the convention, you will get on the ballot, won't you?

A A sheer majority.

Q Well, how can more than one get a sheer majority

in the convention?

A They vote until one has a majority.

Q But then you mean you never have a primary in Illinois?

A Yes, we do have a primary in Illinois. There are provisions in our Election Code for individuals to seek an office within a political party by nominating petitions, but what we are talking about here --

Q I see. So the party itself, then, actually just puts up one candidate.

A The party itself will support, or --

Q If the people of Cook County may, operating through the party, put a man on the general election ballot for a statewide office.

A That is right.

Q What of those who go into a primary, again for the Democratic Party? Who are these?

A There are provisions in our Election Code which permit an individual to obtain a place on a party ballot in a primary by obtaining a requisite amount of signatures.

Q But the choice of the party convention does not oppose him in any primary?

A Oh, yes. Then, at that time, there would be an election. As a matter of due course, we do have primaries in the State of Illinois almost all the time because there are --

Q How does the one who opposes the convention choice, how does he get on the ballot?

A There is a provision that he has to do it by nominating petition.

Q Is the provision anything like this for an independent, 25,000 votes?

A I don't think it is quite the same. It is based upon a percentage who voted in the prior Democratic Primary.

Q In other words, what he would have to do is get some percentage of those on his nominating petition?

A That is right.

Q All of whom, perhaps, might be voters who are living in Cook County?

A I don't believe there is any county restriction on this basis. Now, this doesn't affect the electors we have here, because the electors are not elected at a primary. Those are chosen solely by party convention, in the case of the Republican and Democratic Party in the State of Illinois.

Q And Cook County could select all of the 26 electors at the convention.

A Let's say that due to practicalities, where the Democratic Party is mainly in Cook County in the State of Illinois and the Republican Party is mainly downstate --

Q Well, assume that every Democrat in Cook County at the convention selects all of the 26 electors. They will be

selected and will appear on the ballot.

A That is possible, yes, Your Honor.

As we have said before, counsel has based his entire attack of unconstitutionality on one-man/one-vote. Now, actually, one-man/one-vote doesn't apply here for two reasons, and that is (1) we don't have an election. We fully agree that if there were an elective process, one-man/one-vote would apply, but that would only be where we have representative districts or a legislature. We don't have that in this situation.

What we have done here is, our Legislature has determined that an individual seeking statewide office, or Federal office on a statewide basis, should demonstrate at least the minimal requirements of statewide support, and that we don't believe that the test applied to our statute should be one-man/one-vote, not being based upon representation or election, but rather, whether we have created a situation in the State of Illinois which makes it practically impossible for any individual or new political party to gain a position on the ballot.

We think that the facts will not bear this out.

Q By the way, the electors involved here, who sought unsuccessfully to get on the ballot, whom are they supporting?

A The record doesn't really reflect, Your Honor, but I was told they were supporters of Senator Eugene McCarthy. But that was only hearsay. I have nothing to base that on, but what I have heard.

In relation to the question propounded by Mr. Justice Fortas, in view of the 6.6 debasement which counsel has set forth as being the basis of the unconstitutionality, if we were to assume that one-man/one-vote applied in this situation, what we tried to say was this: that counsel wants us to take off the 200 signatures from 50 counties and just leave 25,000 signatures from anyplace, or one county.

If that were accomplished, we can go into counties in a corner of our State which can be 400 miles away from any other portion of the State, from Cook County, let us say, and we can debase the vote of 99.5 percent of those living in the other counties, because we can garner one-half of one percent from one county having 25,000 or more electors, people who are registered to vote.

We suggest that that, in view of the dissent in MacDougall, under one-man/one-vote, would create an unconstitutional situation which would be of greater significance than counsel suggests exists now.

Q Why do you say that would debase the vote of the others?

A Well, basically the argument is this: that people living in 50 counties represening 6.6 percent of the population can put someone on the ballot who is not acceptable to 93.4 percent of the people.

Q It is the other way around, isn't it?

A I suggest that if you remove that --

Q Isn't it the other way around? As I understand it, the argument is that people who live in 50 of the counties with less than seven percent of the population can prevent the remaining people in the State from putting somebody on the ballot.

A In relation to the argument stated from that point, I would have to say that while it might be possible, it certainly is not probable that an individual, a serious candidate, could not garner 200 signatures, and that we would have such a conspiracy existing in 53 counties that would block anyone from getting on the ballot. I think this is reasonable.

Q Well, that may be, but that is their argument, isn't it?

A That is part of it.

Q Why do you say that if you required that the statute be based solely upon numbers, that might result in debasing the vote of people throughout most of the State?

A Basically, and on his argument stated in the converse, as I originally stated it, that 93.4 percent could have someone on the ballot that was not acceptable to them; likewise, 99.5 percent could have someone on the ballot that was not acceptable to them if this were removed.

But we think we have reached almost an optimum in allowing individuals to get on the ballot in the State of Illinois

I would like to leave the remaining time to Mr. Friedman for any questions you might have concerning particular aspects of the Illinois electoral system.

MR. CHIEF JUSTICE WARREN: Mr. Friedman?

ARGUMENT OF RICHARD E. FRIEDMAN, ESQ.

ON BEHALF OF APPELLEES

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

The second basic issue in this matter is whether or not the Illinois requirements amounts to invidious discrimination, and whether it constitutes an unreasonable burden on the voters in the State of Illinois.

I suggest to you that Illinois has struck a good balance between the interest of the State of Illinois and the interest of those people who may be disadvantaged by this requirement.

There is no precise or objective test which may be applied to a situation such as this, but there are a number of elements, a number of concepts, which may be applied to this particular type of balancing problem.

To begin with, is there a showing of some voter interest by the candidate; and further, is this substantial interest manifest prior to the time of the election? Also, does the candidate have some party structure, some political organization, upon which he bases his candidacy.

But these three conceptual elements, I think, are all bound together further by the question of the experience of the State of Illinois, and more than that, the practicality or the pragmatics of the situation.

A State legislative policy is composed of a number of elements. For example, what is the history of the State? What are the peculiar problems of its geography? What are the attitudes of its people? And a number of other elements, all of which may be variables which could be introduced into this mix.

State legislative objective is also based on appreciation of the people of the State of Illinois of a particular political theory, or a particular political concept. The Constitution does not compel the State to adopt any particular political philosophy or political theory which underlies the legislative objective which is served by this requirement.

What, then, are the legislative objectives which are served by this requirement?

To begin with, I think there is a requirement that a serious candidate must show some voter interest in his candidacy and the reason for this may be based in part on a political theory: appreciation of a legislative objective by the State of Illinois. I would define it as the majority-plurality theory.

Based in part, it would be in a situation where there is a third-party candidacy. It very well may be that the candidate with the highest number of votes may not obtain a majority.

He may merely win by a plurality. It follows as a possibility, that in combination, a third party may actually prefer the party with the second highest number of votes and, in combination, the two together may actually win, or it is conceivable that they could have won by a majority.

This, I suggest to you, is one possible political theory which may be accepted by the State of Illinois.

Q It is a pretty clumsy one to get at this objective, this provision.

A I don't suggest that that, by itself, Mr. Justice, is the whole answer. I would hope that we could regard the situation in its whole context.

We get into another area of experience, and I suggest this to you: The requirement was adopted by the General Assembly in 1935, and it was first imposed for the Presidential election of 1936. In 1932, the Presidential election immediately prior to the imposition of this requirement, there were four independent candidacies on the ballot in Illinois. In 1936, the first year after the imposition --

Q For the Presidency?

A Well, it was for the Presidency; it was also for other offices, as well, other statewide offices, so I think it is quite apt. It is in its broadest view.

But to follow, in 1936, the experience was that there were also four independent candidacies. So I am suggesting to

you, on a numerical analysis alone, immediately before and immediately after the imposition of this requirement, there were four independent candidacies.

I don't think we can demonstrate that a requirement which is rather to meet indicates that such candidacies would flourish; nor does it necessarily follow that a more difficult requirement to meet would indicate that such candidacies would be moribund.

I am only suggesting to you that in the whole political context, there are so many variables that enter into a situation at any given time there is no way to project with any degree of accuracy what would or what might occur in the future, or what would have occurred had not this provision been involved.

A second legislative objective to be served would be a concern by the State of Illinois that any proliferation of independent candidacies might tend to confuse the voters. I would distinguish the Ohio situation which was before the Court in the Williams case from the Illinois situation.

In Ohio there was a requirement that there be signatures from 15 percent of the voters. The numerical figure was, I think, something like 433,000. In Illinois, the comparable figure is that we require only one-half, approximately one-half of one percent of the total voters, or 25,000. So it is a much easier provision to meet in terms of a numerical analysis alone.

Q I wonder, Mr. Friedman, if you could tell us what

the voting strength is in the 50th largest county in Illinois, because they have to get 200 signatures from each of 50 counties. What would the smallest of those 50 counties represent?

A I made this analysis, Your Honor, and I don't know if I can quite meet it. Perhaps I can give you another figure which might be helpful to you.

We have 102 counties. A 50 percent break would be 52. My study shows that there are 54 counties in the State with more than 15,000 voters. Perhaps that meets, in part; it doesn't quite hit it, but I think it is close enough. There are 54 counties where there are more than 15,000 voters in the county.

A third legislative objective to be served by this --

Q Could you break that down into parties as to how -- I know in Cook County you are overwhelmingly Democratic. In counties like that would they be overwhelmingly Republican?

A I don't have those figures at hand, Your Honor. I think I can give you a rather close approximation.

In terms of voter registration alone, Cook County has slightly more than 50 percent, the balance of it being, as it is called, "downstate" Illinois, that is, all the counties other than Cook County.

Q Yes.

A The relative vote in Cook County would account for, I would say, perhaps 60 percent of the Democratic votes throughout the State. The converse would be true with the Republican

Party. Downstate there would be something like 60 percent in the downstate areas; about 40 percent in Cook County.

It would be something like that. I am afraid I don't have specific numbers at hand, but that would be the essential weighting of the relative strength of the parties in the various areas of the State.

I would turn now to the third legislative objective that is served by this requirement, and that would be that a candidate should have his support not limited to a concentrated locality. The reason for that would be that a candidate runs statewide. His policies and his programs should have statewide appeal.

But in addition to that, there is also a practical argument that can be put forward to this. Any serious candidate, of necessity, would have to establish some sort of political structure, at least in the major, most populous areas of the State of Illinois. I suggest to you that this requirement of obtaining signatures in these counties would almost perfectly track what a serious political candidate would have to do in developing an effective campaign.

Q A "serious political candidate" would not have to have an organization in every single county in order to win.

A No, I am not suggesting that, Your Honor.

Q But he does have to have it in order to get on the ballot.

A Well, I am suggesting to you -- yes, to answer your question, it is true that he would have to gather signatures from 50 counties. But more than that, I am suggesting that if he wants to win an election, he must establish a political structure that should have headquarters in a substantial number of the counties in the State.

Q Well, is 50 what you consider the substantial number? That is the point I am talking about.

A I would think in organizing a campaign, you would have to have a political organization in probably all but the smallest counties. I would say the number I gave in response to the question of Chief Justice Warren would be that you would probably have to have an ongoing organization in a minimum of at least 54 counties.

Q And that is the reason for it.

Q Suppose a candidate on the Democratic ticket got the solid Democratic vote from Cook County and from all other counties, solid Democratic vote. How many counties would have to go for him in order for him to be elected?

A I would have to do some rapid calculating.

Q It wouldn't be many, would it?

A No, I would think that perhaps -- well, let me answer it in this way. I think that Cook County, and perhaps the seven or eight next most populous counties in the State, if there was a substantial trend for a candidate, I think he would

be assured of being elected.

Q That is a point for whatever it may mean, that is to say, that in theory, anyway, a candidate could be elected by party vote by a vote of likeminded people in, let us say, eight or ten counties only. But in order for an independent to get on the ballot under this statute, he will have to have some people favoring him in 50 of the counties.

A That is true. Mr. Justice Fortas, I suggest that there might be a slightly different focus to this argument. Heretofore, we have been talking, in response to questions, about the major political parties, the Republican and Democratic Parties. But what we are talking about here is the viability of an independent candidate, how well he may do through this structure.

I think as a practical matter, in order for him to win, he would have to garner at least that many votes.

Q Well, if he is an independent candidate, though, who represents a splinter, a Democratic splinter, or a Republican splinter, suppose he represented a Democratic splinter. It might very well be that his appeal would be confined to a very few counties, even though at the time of the election he might have a formidable vote in the aggregate if he could get on the ballot.

From a pragmatic point of view, it would seem to me that might be the difficulty.

A Your Honor, I would say that is true, but in addition to that, there is one other element of the history of

independent parties in the State of Illinois that may be helpful to the Court.

From the year 1912, through the year 1968, in Presidential years, there were 39 independent candidacies. This works out to approximately 2.6 per time. So I am suggesting to you that both prior to and subsequent to the imposition of this requirement, there have been viable candidacies.

Q Your requirement doesn't mean much anyway, even in serving State interests, if your State interest is to keep down too many independent candidacies.

A Well, 2.6 is the figure that has occurred. It was slightly more prior to the imposition of this requirement than after, but it has been about the same.

Q Well, what interest does the State have in a system that permits the Democrats of Cook County, just the Democrats from one county, operating through their convention, to put a Presidential Elector on the ballot, and all of the independents in Cook County, no matter how many they are, can't get a Presidential Elector on the ballot?

A Once again, the focus of the case before us is not necessarily related to the internal operation of either of the two major political parties. We are talking solely about --

Q Well, I am just suggesting that this necessarily is part of the case, isn't it, when an independent claims he has been denied equal protection of the law because he has to get

200 signatures in 50 counties, and yet maybe 25,000 Democrats in Cook County, operating through their convention, or that all the Democrats in Cook County, operating through their convention, can put a candidate for Presidential Elector on the ballot.

A Well, as a matter of practice --

Q Isn't that true, though?

A Yes, it is; but as a matter of practice -- it is a theoretical possibility. As a matter of practice, in putting together any slate, there is considerable concern to making it as broad-based geographically as possible. It may be that the balance may be top heavy in terms of Cook County, but I think invariably you will find a substantial number of the slate in Illinois from counties other than Cook.

Q Is part of your argument really that this requirement doesn't mean much; that any serious candidate can get it anyway, and that this is just an afterthought?

A No, I think not, Your Honor.

Q You think it is a substantial obstacle to an independent candidate.

A It is an obstacle which must be overcome, and it has been overcome in a number of instances. The legislative objective that could be served would be as I indicated before. The requirement of substantial voter interest, concern about possible proliferation of candidacies, and the like.

Q Well, do you think it has kept off a good many

candidates, then?

A Once again it would be speculative, Your Honor. I know that there have been, perhaps every year since 1930, at least one potential candidate or potential independent slate that has applied for application and has been denied. Now, what the reasons are, I don't know,if it relates precisely to this.

Q I think we can believe then that it is a substantial obstacle from what you say. At least you don't say it is easy.

A No, I don't.

MR. CHIEF JUSTICE WARREN: Mr. Watt, do you have anything further?

REBUTTAL ARGUMENT OF RICHARD F. WATT, ESQ.

ON BEHALF OF APPELLANTS

MR. WATT: Just one very brief comment, if I may.

Mr. Friedman has indicated certain theoretical justifications for the requirement, and these are really a matter of political theory. I suggest they are also a matter of speculation.

In the State of Illinois, unfortunately, we do not have the kind of material which makes it possible to determine what the Legislature really had in mind when it adopted any given piece of legislation. We do not have the raw material for determining legislative history and legislative intent. So in order to speculate that there is a particular theory back of

this, I would say that it is interesting speculation, but I don't think it is anything which this Court can rely on in determining what the Legislature had in mind in 1935. I honestly don't know, and I seriously doubt if there is any way of finding out.

As to whether this is a substantial obstacle or not, I think the answer is clear that it is. There are many, many counties in Illinois where there are fewer than 10,000 registered voters, and furthermore, there is one additional requirement that must be kept in mind with regard to valid signatures for a nominating petition: Anybody who voted in either the Democratic or Republican primary is ineligible to sign a petition for either an independent candidate or a new party candidate.

The result is, it is not simply sufficient to look to the total number of registered voters in any given county; you also have to take into account the fact that many of them, as potential signers of petitions, are automatically eliminated if they voted in either the Democratic or Republican primary. So this makes the obstacle a little bit tougher to get over.

I don't think there is any doubt that this particular requirement can be met, but I also don't think there is any doubt that it has, in a number of instances, kept people from the ballot.

Q How do you suggest it could be met to avoid the constitutional objections you entertain?

A I would say the only way that there could be geographic distributive requirements would be if they were proportional either to the population of the county or the registered voters of the county, in line with the suggestion that Mr. Justice Douglas made in his dissent in MacDougall versus Green.

But unless that were done, I would say that you would simply have to eliminate all geographic distributive requirements.

Q Then how would you have the election? How would a new party get in?

A A new party would get in by filing petitions with the required number of signatures of qualified voters who had not voted in one of the party primaries, and if the total number of valid signatures was up to the minimum required, then that group of candidates, or that individual candidate should go on the ballot.

Q From what counties?

A It would make no difference from what counties.

Q Just from the State.

A Just from the State.

Q Can you think of any other way?

A Well, I suppose you could have almost any variety of techniques for getting independents or new party candidates on the ballot, Mr. Justice Black. In England, as I understand it, you pay a deposit and simply sign papers and pay a deposit

of £200 for certain offices, and if you fail to get a requisite number of the votes, you forfeit your £200. I have not heard that in England they have a terrible problem of proliferation of political parties.

I think this is really an unreal fear that is used to justify a technique which realistically has a tendency to monopolize the ballot to the existing parties.

MR. CHIEF JUSTICE WARREN: We will adjourn.

(Whereupon, at 1:45 p.m. the argument in the above-entitled matter was concluded.)