

# Supreme Court of the United States

OCTOBER TERM, 1970

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In the Matter of:

Docket No. 5714

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LINDA JENNES ET AL.,

Appellants

vs.

BEN W. FORTSON, SECRETARY OF  
STATE OF GEORGIA,

Appellee  
----- X

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OCTOBER TERM 1970

LINDA JENNESS, ET AL.,

Appellants

vs

BEN W. FORTSON, SECRETARY OF  
STATE OF GEORGIA,

Appellee

No. 5714

The above-entitled matter came on for argument  
at 11:14 o'clock a.m. on Monday, March 1, 1971.

## BEFORE:

WARREN E. BURGER, Chief Justice  
HUGO L. BLACK, Associate Justice  
WILLIAM O. DOUGLAS, Associate Justice  
JOHN M. HARLAN, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice

## APPEARANCES:

PETER E. RINDSKOPF, ESQ.  
Suite 1154  
75 Piedmont Avenue, N.E.  
Atlanta, Georgia 30303  
On behalf of Appellant

ROBERT J. CASTELLANI  
Assistant Attorney General,  
State of Georgia  
Atlanta, Georgia  
On behalf of Appellee

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 5714: Jenness against Georgia.

Mr. Rindskopf, you may proceed whenever you are ready.

ORAL ARGUMENT BY PETER E. RINDSKOPF, ESQ.

ON BEHALF OF APPELLANTS

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

This is an appeal from a three-judge Federal Court, pursuant to 28 United States Code, Section 1253. That Court denied the Appellants' motion for preliminary and permanent injunction against the application, enforcement, execution of Georgia Code Annotated, Section 34-1010.

Section 34 of the Georgia Code is the Georgia Election Code and I think for convenience sake I will just refer to the individual sections as, for example, Section 1010.

The Appellants in this case are the Georgia Socialist Workers Party, candidates for Governor and for two of the Congressional Districts in the State of Georgia, voters who desire to support them and the class of persons who desire an opportunity to consider persons on the ballot other than Democrats and Republicans.

Section 1010 of the Georgia Election Code provides simply that in order to get on the ballot unless you come within



1 stated exceptions, you must secure the signatures of 5 percent  
2 of the voters who were registered to vote for the office that  
3 you seek at the last time it was previously offered for  
4 election. It is a straight 5 percent of the registered elec-  
5 torate.

6 In the case of the lead Appellant, Mrs. Jenness,  
7 the candidate for Governor of the Georgia Socialist Workers  
8 Party, 5 percent of the number of the registered voters at the  
9 last time the office she sought would come out to be some  
10 88,175 signatures.

11 Q Is that a requirement, Mr. Rindskopf, that  
12 the signatures need to come from a specified number of counties,  
13 of anything such as that?

14 A No, Mr. Justice Stewart, we do not have any  
15 distribution problem except insofar as, for example, in a  
16 Congressional candidate, the signatures must --

17 Q They have to come from the District, of  
18 course. They would have to come from the constituency, but  
19 the Governor always has a statewide constituency --

20 A That's correct.

21 Q -- anywhere in the constituency.

22 A Yes, Your Honor.

23 Q In other words, for the gubernatorial  
24 candidate they could have all come from Fulton County, for  
25 example?

1                   A       They could have all come from Fulton  
2 County; that's correct.

3                   Q       The candidate for a Congressional seat  
4 wouldn't need anything like 80,000 signatures on a petition,  
5 though, would he?

6                   A       No, Mr. Chief Justice, in the two districts  
7 with which we are concerned, which are the Congressional  
8 Districts which divide the City of Atlanta, the Fourth and  
9 Fifth, the numbers were 10,000 and 11,000.

10                  Q       Mr. Rindskopf, as I remember in Williams  
11 against Rhodes the figure was 15 percent of actual votes cast;  
12 am I correct in that?

13                  A       That is correct: 15 percent of the vote  
14 case.

15                  Q       And here it is 5 percent of the registered  
16 voters. Which is the more difficult of the two provisions to  
17 meet?

18                  A       As we have attempted, as we shown in our  
19 brief at page 8 and page 9, in Georgia the number of voters is  
20 generally about 50 percent of the number of registered voters,  
21 or it has been in the last two gubernatorial elections.

22                        So, the 5 percent total here actually works out  
23 to something in the neighborhood of 10 percent of the votes  
24 cast.

25                  Q       Incidentally, is a write-in permissible in

1 Georgia?

2 A Write-ins are permissible.

3 Q Your answer to Justice Blackmun would be  
4 what? Which is the easier?

5 A Well, the 5 percent here comes out to  
6 slightly less than the 15 percent in Ohio. It comes out to  
7 about 10 percent by the Ohio standard, so Georgia's requirement  
8 is some percentage points easier, in terms of numbers, than  
9 Ohio.

10 I might add that since that time Ohio has changed  
11 its laws, reduced its percentages, and in a three-judge Federal  
12 Court decision this summer those reduced percentages were held  
13 unconstitutional.

14 Q There were other factors in the Ohio case  
15 that are not present in this statute?

16 A I think that's certainly correct, Mr.  
17 Justice Harlan. The first time the case was here; I am not  
18 so certain that it was correct when it was back in Ohio. They  
19 were dealing with a number of the laws which this Court had  
20 already struck down and it seems that they were pretty well  
21 able to isolate out the number of signatures required and  
22 strike that down on its own rather than as part of an en-  
23 tangling web, as the Court has said.

24 When I say that the candidates here are candidates  
25 of the Georgia Socialist Workers Party, I should point out that

1 the Georgia Socialist Workers Party is a political body,  
2 according to the laws of Georgia, which means two things: it  
3 means first that its candidates failed to receive 20 percent  
4 of the votes the last time the office of Governor was contes-  
5 ted and, it means that its candidates failed to receive 20  
6 percent of the nationwide vote for President.

7 But, it also means one more thing: it means that  
8 the party is registered with the Office of the Secretary of  
9 State pursuant to Section 901 of the Election Code, which  
10 basically requires the party to go through the same procedures  
11 that a corporation would to register. It has to file its  
12 bylaws, submit the names of its officers, and any other infor-  
13 mation the Secretary may, in fact, desire.

14 The Georgia Socialist Workers Party has complied  
15 with this requirement.

16 Q This is the status that the Republican  
17 Party occupied for quite a long time in your state; isn't it?

18 A Well, it is and it is not, Your Honor.  
19 The Republicans, of course, have been on the ballot by peti-  
20 tion at the last gubernatorial election before this one.

21 Q And they were they by petition because  
22 they occupied the status of your client?

23 A That's correct. That is correct.

24 Q And their candidate, in fact, as I remember  
25 then got a larger vote than the man who was declared governor.



1 A He received a plurality.

2 Q Mr. Bo Callahan or something?

3 A Calloway, Your Honor.

4 Q Calloway.

5 A Also pursuant to the Georgia Election Code,  
6 the candidates of the Georgia Socialist Workers Party were  
7 nominated by the party to be its candidates for office in a  
8 convention of the party and certification of the nomination  
9 was filed with the Secretary of State.

10 So, we don't have here exactly the case of com-  
11 pletely independent candidates. The nominees of the party here  
12 have had to go through at least one hurdle before they get to  
13 the problem of gathering signatures.

14 On the other hand, party candidates in Georgia,  
15 belonging to a party which collected 20 percent of the votes  
16 for Governor or President, need not gather any signatures at  
17 all, nor need that party in its primary, secure any definite  
18 number of votes before they can get on the ballot for the  
19 final election. And in fact, in the instant case, the number  
20 of signatures that Mrs. Jenness would have been required to  
21 secure, exceeded the number of votes that were actually cast  
22 in the Republican primary for the winner of that primary.  
23 He got some 62,000 votes; Mrs. Jenness would have had to get  
24 some 88,000 signatures.

25 Q What was the total cast in the primary?

1 A Just over 100,000, Your Honor.

2 So, it was just slightly in excess of the  
3 signature requirement that she was required to meet. But,  
4 there is absolutely no requirement once a party qualifies as a  
5 party that it, in its primary, before it put its candidate on  
6 the ballot at the final election, show any scintilla of voter  
7 interest in the party.

8 Q Except that, the party must have received  
9 at least 20 percent of the votes the last previous election.

10 A At the last previous election.

11 Q And that, one can infer is strength,  
12 continuing strength in a political organization that has  
13 managed to acquire that much vote, I suppose.

14 A Well, up until very recently, of course,  
15 Georgia was strictly a one-party state.

16 Q Yes, as you just said, up until very  
17 recently the Republican Party of Georgia occupied the status  
18 that your client now occupies.

19 A That's correct.

20 I might add that the 20 percent requirement came  
21 in for the first time in 1964; prior to that time to be a party  
22 and be on the ballot regularly, going back to 1943, all you  
23 needed was to obtain 5 percent of the vote at previous elec-  
24 tions.

25 Before 1943, going back to the Georgia Code of

1 1922, anybody could be a candidate who registered himself as  
2 such with the Secretary of State. There was no requirement  
3 that his party secure any certain number of votes; nor was  
4 there any requirement that he, himself get a petition with any  
5 number of signatures.

6 Q This 5 percent is bad, according to your  
7 argument. What percentage do you think would be all right,  
8 constitutionally?

9 A Well, of course I would want to argue that  
10 you don't reach that question in this case because we think  
11 the 5 percent is a restriction of freedom of speech. But, it  
12 seems to me that, in terms of what's required in the other  
13 states, the vast majority of those other states require one  
14 percent or less.

15 It seems to me that whatever the reason that the  
16 state can come up with for this requirement, it seems to me  
17 that really its only justification could possibly be to protect  
18 the ballot against clearly frivolous candidates.

19 Q Your First Amendment would knock out all  
20 requirements of this type; wouldn't it?

21 A Yes, it would, Your Honor; yes, it would.  
22 Unless, of course, the state could show some sort of danger  
23 which would accrue from unlimited numbers of candidates getting  
24 on the ballot. I don't think that, based on what the Court  
25 said about the Ohio case, or based upon what the state said

1 below here, that there is any sort of conceivable danger.

2 Q Mr. Rindskopf, just before the last ques-  
3 tion you were tracing the Georgia legislative history and said  
4 that at one time there was no percentage requirement at all.  
5 What is the implication of that. Bring me along a little more  
6 closely.

7 A The implication of that, it seems to me,  
8 is exactly the same implication that the recent three-judge  
9 court in Ohio on the decision in 318 Fed. Supp. found that when  
10 Ohio jumped its requirement from one percent to seven percent  
11 and later back to four percent the state had to show some kind  
12 of compelling interest for that increase. Ohio was unable to  
13 show any compelling interest for that increase similarly in  
14 Georgia. We would say that there has never been any showing  
15 by the state that the increase from no signature requirement to  
16 five percent of the registered voters has been shown.

17 It seems to me that the five percent requirement  
18 was adopted completely arbitrarily in 1943, but it was con-  
19 tinued again in 1964. There never has been any showing,  
20 nothing in the record in this case --

21 Q What is the purpose of it, in your estima-  
22 tion?

23 A I really could not say. It's not like the  
24 situation in Ohio where Henry Wallace received enough votes to  
25 cast some sort of doubt about the result of the election,



1 because in Georgia, going back to 1872, everytime there has  
2 been a statewide race the Democrats have carried.

3 So, it strikes me that it was a revision of the  
4 election code and while they were revising it someone said,  
5 well, we should put in some sort of a requirement. There is  
6 nothing in the legislative history which would indicate any  
7 reason for the change from zero percent to five percent.

8 Q There is nothing in Georgia law that  
9 prevented in any way Mrs. Jenness or the two Congressional  
10 candidates from campaigning to the extent they wanted to cam-  
11 paign for the office that they sought, is there? Holding  
12 meetings, having all the associational privileges they want;  
13 making all the speeches they wanted, passing out all the  
14 literature they wanted and urging their adherents and supporters  
15 to write in their names?

16 A It's just as it was in Ohio, there was a  
17 state restriction on doing First Amendment kinds of things.  
18 The restriction is getting on the ballot.

19 Q Well, specifically, the First Amendment  
20 kind of things is rather a broad category. In answer to my  
21 question, free to campaign, free to organize, free to do  
22 whatever they wanted; free to pass out literature and make  
23 speeches in support of their candidacy, were they not?

24 A Certainly; certainly. I don't think there  
25 is any question that such a restriction would equally follow

1 and we don't have that here.

2 There is one specific problem with the write-in  
3 vote in Georgia which may not be present in other states, and  
4 that is that there is a direction in the election code which  
5 requires write-in votes to be counted by the people counting  
6 the votes exactly as they are written so that if there were a  
7 write-in vote for Linda Jenness and another write-in vote for  
8 Mrs. Linda Jenness, those two votes would be counted separately  
9 and however many write-in votes went down under the one column  
10 or under some wrong spelling, would be counted separately and  
11 there would be no accumulation of the votes.

12 Q Well, they would be counted?

13 A They count write-in votes; yes, Mr.

14 Justice Black. There is --

15 Q Sometimes they get elected; don't they?

16 A I don't know of any recent example of the  
17 write-in balloter being elected to Governor in Georgia.

18 Q Oh, Georgia, but county officers, important  
19 county officers.

20 A Well, it's conceivable. I don't think  
21 there is any showing in the record as to whether it has ever  
22 happened.

23 Q You mean in Georgia?

24 A In Georgia.

25 Q Well, I know it has happened in other places

1 close by Georgia.

2 A Well, certainly it has. Another restric-  
3 tion on the signature gathering that takes place in Georgia,  
4 is the requirement that signatures be gathered by apperson who  
5 is eligible to vote for the office that is being sought.

6 For example: in the Fourth and Fifth Congressional  
7 Districts, which divide the City of Atlanta, the Socialist  
8 Workers Party would not gather signatures in the Fifth Dis-  
9 trict with a member of its party who was, in fact, registered  
10 in the Fourth District. And this, I think, is an impairment  
11 on the signature gathering requirement. It makes it, I think,  
12 somewhat more difficult than it appears upon its face.

13 It means that unless the party is distributed  
14 equally among Congressional Districts its chances of gathering  
15 signatures in one district or the other depends, not on the  
16 membership of the party, but on where the members of that  
17 party live. And --

18 Q Is this true in statewide elections, too?

19 A Well, of course in a statewide election  
20 anyone living anywhere in the state would be eligible to vote.  
21 Two of the Appellants here, of course, sought Congressional  
22 Districts. They were not running for at-large Congressional  
23 seats; they were running for specific geographic districts.

24 And a major problem, it seems to me, along the First  
25 Amendment line is the problem of one's FCC privileges,

1 whether one can get free or equal time if one is only a write-  
2 in candidate or if one is a candidate who is duly qualified.  
3 FCC, or at least the television stations in Georgia have per-  
4 mitted people who are registered with the Secretary of State  
5 as write-in candidates, to enjoy equal time. They have not  
6 permitted persons who were not registered as write-in candida-  
7 tes and who did not meet the signature requirement to have  
8 that equal time.

9 So, to that extent, a failure to either register  
10 yourself as a write-in candidate, or to appear -- either to  
11 register yourself as a write-in candidate or to secure the  
12 signatures is, in fact, a limitation on your ability to appear  
13 before the public.

14 In terms of the candidates here, the record has  
15 their affidavits as to poverty, they are presuming in forma  
16 pauperis, in fact, in this Court. The record also contains  
17 stipulations of the parties as to the expense that was in-  
18 curred by the Secretary of State, in checking the signatures  
19 that were gathered by Mr. Calloway and by Mr. Wallace, when  
20 they successfully met the petition requirements. And those  
21 figures are some \$77,000 and \$81,000, by the Secretary of  
22 State, just to verify the signatures which were gathered.

23 There was no actual showing in the record as to  
24 how much it cost to gather those signatures, but it would seem  
25 to me to be a highly reasonable speculation that it certainly



1 cost at least that amount to go out there physically and  
2 gather those signatures.

3 Q You haven't brought here the filing fee  
4 requirement, have you?

5 A No, Your Honor, and in fact, we success-  
6 fully challenged that in the lower court and the state has  
7 not appealed.

8 So, if they were able to get their signatures  
9 and show poverty they could go on the ballot without paying  
10 anything.

11 I think the argument that the state has made  
12 here is illustrative of the fact that the state really has no  
13 compelling interest in this requirement. The state, for  
14 example, has said in its brief that Georgia does not have  
15 very restrictive laws and it points to some examples of other  
16 states with more restrictive laws. For example, states where,  
17 if you have voted in a party primary you cannot then come  
18 along and sign a petition for an independent or a nonpolitical  
19 party candidate.

20 It's quite true that in Georgia, anybody, as long  
21 as he is a registered voter, can sign a petition. It doesn't  
22 matter if he intends to go out and vote in the Democratic  
23 or Republican primary the next day, and it seems to me that  
24 this very freeness that Georgia offers indicates that it really  
25 doesn't have any real purpose in imposing the signature

1 requirement.

2 Q I take it then, Mr. Rindskopf, you would  
3 be making the same argument if the percentage was one percent  
4 or a half a percent?

5 A Well, I certainly don't have to make that  
6 argument in terms of reasonableness, because of course it is  
7 here five.

8 Q Well, I know, but it isn't reasonableness  
9 -- if that's all it is -- if you, for example, suggested that  
10 perhaps the state would have a compelling interest in requir-  
11 ing one percent, then it does come down to a judgment as to  
12 how much that is worth and maybe the state--

13 A Well --

14 Q Wouldn't you argue that there couldn't be  
15 a compelling interest for even a half percent?

16 A I would think, Your Honor, subject to the  
17 qualification, that the state might be able to impose some sort  
18 of nonfrivolous --

19 Q Non frivolous what?

20 A Non-frivolous. I think they might well be  
21 able to protect the ballot against completely frivolous can-  
22 didates.

23 Q Well, is that a compelling interest?

24 A I should think it might well be.

25 Q And how much is that worth? Half a

1 percent?

2 A How could you weigh these things?

3 Q Well, why isn't it worth 5 percent?

4 A Well, I think, to go to as much as 5  
5 percent or 10 percent of the actual votes becomes unduly  
6 burdensome. It becomes in actual terms, an impossibility for  
7 people who do not have some large support.

8 Q By "support," you mean money, resources?

9 A I mean both money, Mr. Chief Justice, and  
10 people who are members of their party or who might be able to  
11 go out and gather signatures for them, to say nothing of  
12 people who might be willing to sign on their behalf.

13 Q Well, I suppose, at least I could, take  
14 judicial notice of the fact that some of the very significant  
15 political expression in this country is done by young people  
16 and others not so young, who are pure volunteers who would do  
17 these things if they had a belief; if they had convictions  
18 about that particular issue or party.

19 Now, in terms of collecting, whether it's 10,000  
20 names or 5,000 names, isn't that entirely possible with purely  
21 volunteer efforts if, in fact, there is a significant support  
22 for the views of either that party or that candidate?

23 A Well, it may very well be that the views  
24 may be very unpopular ones, such as socialism in the State of  
25 Georgia. I think the fact that the views may not attract a

1 large number of adherents, is not really the determining  
2 factor.

3 Or, turning to the young people, for example, if  
4 in fact, they were not registered to vote in Georgia, they  
5 would not be eligible to either collect the signatures or to  
6 sign the petitions themselves.

7 Q Well, when you spoke earlier, I think in  
8 response to Mr. Justice White, you referred to a compelling  
9 state interest and related that to frivolous candidates. Now,  
10 did you mean by that the candidate who was frivolous because  
11 of his person or his views, or a candidate who was frivolous  
12 in the sense that he never could get more than minimal support.

13 A I think that a frivolous candidate is  
14 someone who qualifies for office just because he wants to see  
15 his name on the ballot. It may well be that even he has  
16 First Amendment rights which would be infringed by any such  
17 signature requirement. But in the instant case they have gone  
18 to the trouble of organizing themselves as a political body,  
19 according to Georgia law. They have filed papers with the  
20 Secretary of State; they have paid him a minimum fee for filing  
21 those papers. I think they have gone far beyond any sort of  
22 frivolous question.

23 MR. CHIEF JUSTICE BURGER: Mr. Castellani.

24 ORAL ARGUMENT BY ROBERT J. CASTELLANI,

25 ASSISTANT ATTORNEY GENERAL OF GEORGIA,



1 ON BEHALF OF APPELLEE

2 MR. CASTELLANI: Mr. Chief Justice and may it  
3 please the Court:

4 Mrs. Jenness's argument and her attack on  
5 nominating petition laws is based on two different grounds:  
6 the first ground is that she claims there is a denial of her  
7 equal protection rights.

8 The second ground: she claims these laws violate  
9 her right to freedom of association as has been recognized by  
10 this Court in William versus Rhodes.

11 We shall characterize the equal protection argu-  
12 ment as "The grass is always greener on the other side"  
13 argument. In Georgia, as has been noted by this Court, there  
14 is not this tremendous imbalance between the two tests or  
15 methods to get on the general election ballot.

16 In Williams we had all the additional burdens that  
17 were placed upon third party candidates. Ohio completely  
18 eliminated independent candidates. In Georgia, except for the  
19 actual vehicle itself, that is the petition method as opposed  
20 to the primary method, there is not this imbalance. As a  
21 matter of fact, as a result of the three-judge court decision  
22 below, if you go the petition method then if you can allege  
23 poverty you do not have to pay any qualifying fees.

24 We therefore think that this lawsuit is bottomed  
25 on an incorrect assumption. The assumption that is incorrect

1 is that a primary method is easier than a petition method.  
2 We believe that if anyone went through both of these methods  
3 he would seriously question this assumption.

4 Now, Mrs. Jenness sees a primary as a method  
5 whereby a candidate merely sits at home and waits for the votes  
6 to come to his door and he is automatically nominated and  
7 authorized to go on the general election ballot. In fact, that  
8 is not the case. The primary candidate has to expend tremen-  
9 dous amounts of energy; his own resources; his organiza-  
10 tional problems, the complexities of a campaign, particularly  
11 for the gubernatorial nomination in Georgia are simply not  
12 recognized by Mrs. Jenness when she sees this imbalance between  
13 the two methods.

14 Further, if a general primary candidate is de-  
15 feated he no longer has a chance to get to the general elec-  
16 tion ballot, whereas to the person who is going the petition  
17 method, once they obtained the required petitions there is no  
18 problem of going on the ballot. They are automatically certi-  
19 fied and they go on the general election ballot.

20 Therefore, we believe that while the grass may  
21 seem greener to Mrs. Jenness, in actual fact, a close and  
22 realistic examination of the two methods to get on the general  
23 election ballot in Georgia, will show that there is no in-  
24 equality and her claim on this basis must fail.

25 Q Your position has brought out the fact that

1 the five percent figure though, is at the high point in com-  
2 parative figures with other states. Do you have any comment  
3 about that, Mr. Castellani?

4 A Yes, sir, Mr. Justice Blackmun.

5 If you only look at the number of petition sig-  
6 natures that are required, Georgia, although it is not the  
7 highest, is probably higher than most. However, as we  
8 attempted to show in our brief, there are numerous other dis-  
9 abilities that are placed upon petition-gatherers in other  
10 states that have these lower poll requirements. If I might,  
11 some states require that when you sign the petition you have  
12 to agree to support the candidate in the general election.  
13 Georgia has nothing like this at all.

14 Some states prohibit you from participating in  
15 any primary. As a matter of fact, Mrs. Jenness could parti-  
16 cipate at the party's primary of her choice in Georgia. She  
17 could run as a petition candidate and yet go and vote in the  
18 primary and vote for the person that she would be most likely  
19 to oppose in the general election.

20 Some states forbid you to sign any other petition  
21 besides the first one. In other words, the first person to  
22 get to you, that's it. You are disqualified for any there-  
23 after. In Georgia you can sign as many petitions as you want.  
24 Some states require that you must not be registered in any  
25 political party.

1 In at least one state -- I believe it's Rhode  
2 Island, they prohibit you from participating in any primary  
3 for 26 months after you sign a petition.

4 Now, we did not make an exhaustive study --

5 Q Mr. Castellani, why did they pick this  
6 method? Why did the State of Georgia, at this late date,  
7 one; and number two: pick the 5 percent?

8 A Well, sir, the late date was 1943.  
9 Secondly, this method was because 49 of the 50 states depend  
10 upon nominating petitions as an alternative in one form or  
11 another. Florida is the only state that I know that does not  
12 use the nominating petition method as an alternative.

13 Q Well, has anything happened in Georgia  
14 that suddenly made them realize that this was a good way of  
15 doing it?

16 A Mr. Justice Marshall I am not a Georgia  
17 historian. I don't believe I can answer that question.

18 Q Well, can you answer the five percent  
19 question?

20 A No, sir; I think that --

21 Q Well, what's the state's interest in the  
22 five percent?

23 A Well, the state's interest in the five  
24 percent, it seems to me, and I realize this Court has looked at  
25 an awful lot of election cases and you have had the interest



1 thrown at you. We think that there are probably three  
2 interests that probably overlap, but the first interest is, as  
3 has been noted by the Court, completely frivolous candidates.  
4 So that whatever you want to define that you consider frivol-  
5 ous candidates, we think of them as the person publicity  
6 seekers; a person who is wasting everyone's time, if I can use  
7 that term.

8 The second interest is that the national movement  
9 today is an attempt to get more people to vote, to make it  
10 easier to vote and we have had numerous comments about the fact  
11 that had 12 candidates for governor in the primary, which is  
12 too confusing and people just couldn't make up their minds.  
13 We think that's an interest to keep it down to serious can-  
14 didates.

15 We also believe that by having this requirement  
16 we can, to a certain degree, encourage stability and compro-  
17 mise. If every splinter group knows that they have access to  
18 the general election ballot they are going to just go their  
19 own separate way and we think that this is not conducive to  
20 a good electoral process.

21 Q I recognize your answer to the general  
22 question, but I'm still left with the point: why five instead  
23 of one or one-half, two, three, four.

24 A And I say there were no legislative  
25 materials that I have been able to find that would indicate

1 the why clause.

2 Q Well, you said that in the forties when you  
3 adopted this you looked at the other states. Did you find  
4 that the other states were five?

5 A Yes, there are other states with five.

6 Q How many?

7 A I don't remember offhand, just three or  
8 four --

9 Q Well, I have great difficulty in your  
10 saying you were trying to get in line with the other states  
11 when it looks to me like you passed some of them.

12 A We admit that we passed some of them.

13 Q Why --

14 A We attempted to show before --

15 Q What's so peculiar in Georgia that you  
16 need five percent?

17 A Well, they made the figure five percent;  
18 I can't say why they chose five percent --

19 Q I appreciate that.

20 A -- maybe they chose ten and decided to  
21 cut it in half; I just don't know. But, the thing is they  
22 made it so much easier to gather these petitions. Most of  
23 these other states with the one percent or the one-and-a-half  
24 or two percent also, and this is what bothers me, is that in  
25 another state you go out and you sign one of these petitions

1 I doubt very seriously that the person who is gathering these  
2 signatures tells you: now wait a minute, if you sign this  
3 petition you are not going to be able to vote in the primary.  
4 In other words, you can't be registered with another party or  
5 that you are going to be disqualified. Georgia has opted for  
6 the other procedure: five percent. But, as long as you are  
7 registered, sign as many petitions as you want and continue to  
8 participate in the political party primaries and this is their  
9 method.

10 Now, I couldn't give you an explanation as to why  
11 five percent was chosen. I am sorry. I talked with several  
12 people and they just don't know.

13 Q Mr. Castellani, I hope I'm not repeating  
14 anything Mr. Justice Marshall asked you, because I couldn't  
15 hear his question, but do you have, do you know of any reason  
16 why Georgia moved from no requirement at all to the present  
17 one that's under challenge?

18 A I have a guess and unfortunately I did not  
19 prepare myself on this point and I apologize; I probably should  
20 have. I think that previously Georgia did not authorize any-  
21 body, did not allow independent candidates to run. You had to  
22 be a party candidate, and then I think that there are several  
23 states where this was the case and <sup>in</sup> my research of this ques-  
24 tion this problem has come up.

25 There were five or six states where you had to be

1 on a party.

2 Q So your suspicion is that Georgia moved  
3 in the direction of liberality rather than in the opposite  
4 direction?

5 A Yes, sir; yes, sir. I believe that  
6 previous to the 1930s and the 1940s before this came in I  
7 do believe that there was -- you had to be a party candidate;  
8 you couldn't get on a general election ballot, but I'm not sure  
9 and I apologize.

10 Q Mr. Castellani, in your recital of  
11 possible interests of the state you did not mention the one  
12 sometimes included: the possible fraud on the voters. I'm  
13 thinking of the case in the State of Nebraska some years ago  
14 when Senator George Norris was up for reelection and there was  
15 a great effort to defeat him which I think, if I recall the  
16 history, succeeded, and one of the mechanisms was to find a  
17 man by the name of George Norris and put him on the ballot to,  
18 obviously to divide the vote.

19 Is that, whether you call it compelling or not,  
20 is that a legitimate state interest, to have some limitation,  
21 whether it's five percent or ten or 15 or three?

22 A Yes, sir; I would agree that it is. And,  
23 as I prefaced my remarks: I don't pretend to be an expert in  
24 the area of election law and I think that this Court in its  
25 experience has certainly come across more cases and is more



1 aware of the interests that a state has than I could. I  
2 think of the ones that I think are the most obvious to most  
3 people who are in this area, but of course to this Court that  
4 is surely a legitimate consideration.

5 Q Well, Mr. Castellani, isn't it true that  
6 the primary case, the white primary case in Georgia came around  
7 '44 and prior to that time there wasn't but one party in  
8 Georgia.

9 A Which white primary case?

10 Q The King case.

11 A I'm not familiar with that case.

12 Q It was the case that opened up the white  
13 primary to let Negro Republicans vote in the white primary.  
14 There wasn't but two parties there then; right?

15 A Again I say I am not familiar with the  
16 history of Georgia around 1944, so --

17 Q Could this have been to keep out third  
18 parties? Could that have been the reason?

19 A Could it have been to keep out third  
20 parties?

21 Q Yes.

22 A I can't say. I can't say what -- I can't  
23 say that there was one overriding mode over all of these other  
24 modes. I wasn't there and I haven't been able to talk with  
25 anybody who has been able to give me one good reason why. They

1 all have their own versions of what they recall, but that's  
2 it, and I doubt that that would be evidence before this Court  
3 anyway.

4 Q Well, for a while it not only kept out  
5 third parties; it kept out second parties, didn't it?

6 A Just about. I'm not so sure that the law  
7 was an instrument which kept out people in the second party.  
8 I think that --

9 Q Well, the fact was that there was just a  
10 single party.

11 A The second ground on which these nominating  
12 petition laws are challenged is that they violate this freedom  
13 of association right that has been recognized by the Court in  
14 Williams versus Rhodes. Of course, the Williams case is the  
15 touchstone case in this field.

16 We hope that this Court can see the differences  
17 between Georgia's law and Ohio's law. This Court several  
18 times in its opinion in Williams, stressed this entangling web,  
19 the totality of the Ohio structure that made it impossible for  
20 third parties to get on the general election ballot. We  
21 believe that we have shown that Georgia has only the actual  
22 vehicle itself; that's the only difference that there is.

23 Now, we would like also to stress to the Court  
24 that this law is not an absolute bar to appearing on the  
25 ballot. It may be treated by some as a bar, but it is not.

1 We have indicated before, numerous candidates, both state-  
2 wide candidates and local candidates have gained access to the  
3 general election ballot through the petition method.

4 Q What does it take to get on the ballot  
5 by the petition method?

6 A This is the method under consideration:  
7 five percent, which we call the petition method --

8 Q I see. And you say a number have  
9 succeeded?

10 A Yes, sir; the two most noteworthy candi-  
11 dates statewide, are of course George Wallace, and before him,  
12 Howard "Bo" Calloway, the candidate for Governor, who received  
13 the plurality but didnot receive the majority and this Court  
14 decided Fortson versus Morris that the legislature could go  
15 ahead and elect and they elected his opponent.

16 Now, Mrs. Jenness has argued that it is an  
17 absolute bar to her because she simply can't meet it. Well,  
18 we would first say to this Court there is nothing in this  
19 record to show that she or anyone in her class has really  
20 tried to meet it. We don't know what kind of effort would be  
21 required because they have never tried. At least the record  
22 doesn't show they have ever tried to go out and gather signa-  
23 tures.

24 Now, we will admit that some expenditure of effort  
25 is needed. However, as we have indicated before, expenditure

1 of effort is also needed to win a primary. And we believe  
2 before you can gain access to the general election ballot that  
3 the state does have a right to require this showing.

4 We would also point out to the Court that the  
5 Court decision below had removed the qualifying fee from  
6 pauperism.

7 As this Court has also indicated previously, the  
8 nominating petition law does not impinge in any way on the  
9 right of Mrs. Jenness to meet with others of her choice, to  
10 hold public meetings, to advocate any ideas, to solicit  
11 members to her group, or in short, to do anything else to gain  
12 access to the minds of her fellow citizens and to seek to per-  
13 suade them to her point of view.

14 Now, as I have indicated, 49 states have nomina-  
15 ting petition laws. Again, some are higher; most are lower;  
16 some are the same as Georgia's. However, as we have indicated,  
17 these other restrictions, we think, can at least point out to  
18 this Court, although Georgia on its face, may be higher than  
19 some of the states, perhaps a majority of the states, that you  
20 can't just judge nominating petition laws on the number of  
21 signatures required. You need to go deeper into the election  
22 code, into the election scheme if you are going to make a com-  
23 parison of Georgia with the other states in the nation.

24 We would stress to this Court that election codes  
25 are not static instruments; they are continuously being



1 revised; they are under study by the legislature, by private  
2 citizens groups, by interested people. We would ask this  
3 Court to authorize the use of nominating petitions by the 49  
4 States who depend on them to help their election laws.

5 The national movement in election law today is to  
6 make it easier to vote; to get people to the polls. We believe  
7 that the petition law has a valid requirement and the state  
8 has an interest in upholding it and we would ask this Court to  
9 affirm the judgment of the three-judge court below and  
10 authorize its use.

11 Thank you.

12 MR. CHIEF JUSTICE BURGER: I think we will suspend  
13 now and let you begin right after lunch, Mr. Rindskopf.

14 (Whereupon, at 12:00 o'clock p.m. the argument in  
15 the above-entitled matter was recessed to be resumed at 1:00  
16 o'clock p.m. this day)

1 1:00 o'clock p.m.

2 MR. CHIEF JUSTICE BURGER: Mr. Rindskopf, you  
3 have three minutes left.

4 REBUTTAL ARGUMENT BY PETER E. RINDSKOPF, ESQ.

5 ON BEHALF OF APPELLANTS

6 MR. RINDSKOPF: I just have the briefest of points,  
7 Your Honors.

8 First, when my opponent says that the 1943 laws  
9 were less restrictive than the 1922 laws, he is just plain  
10 incorrect. In 1922, in the Election Code found in the 1922  
11 Session laws at page 100, it states very clearly that the  
12 names of candidates of each political party and also the names  
13 of any other candidates for the offices to be filled, are to  
14 be placed on the ballot. And it further provides that all  
15 candidates for national and state offices, or the proper  
16 authorities of the political parties nominating them, shall  
17 file notice of their candidacy, giving their names and the  
18 offices to which they are candidates, to the Secretary of  
19 State.

20 So, the 1943 move from no petition requirements  
21 to five percent was, in fact, more restrictive. Up until that  
22 time anyone could get on the ballot simply by filing a notice  
23 of candidacy with the Secretary of State.

24 The second point I would like to make is --

25 Q They could be on the general election

1 ballots?

2 A That is correct. The law says "in all  
3 elections other than primaries conducted by political parties,  
4 it shall be the duty to place on the ballot the names of party  
5 nominees and all others who wish to be candidates."

6 Q Do you care to comment on the state's  
7 interest in preventing fraud on the voters by use of the same  
8 or similar names of candidates?

9 A Yes, I would. I think the state is ade-  
10 quately protected here in at least two ways: first, the  
11 closing date for petition requirements is the same date as the  
12 closing date for nominees who wish to enter into a party  
13 primary. So that you cannot come along after the party primary  
14 and file a notice of independent candidacy unless it's a fore-  
15 gone conclusion who is going to win the primary --

16 Q Sometimes that is in Georgia; isn't it?

17 A Well, I think the election spirit is a  
18 little more rough and tumble than that. It's probably safe to  
19 say it's a foregone conclusion that the party nominee is going  
20 to win. But --

21 Q The party nominee was what?

22 A The Democratic Party nominee usually wins  
23 the election. But, there is a second restriction which the  
24 state has, and legitimately, and that is that party nominees  
25 appear on the ballot, along with a party designation, such as

1 Lester Maddox: Democrat. An independent nominee wishing to  
2 put a fraud upon the voters by appearing under the same name  
3 would not have that party designation.

4 It seems to me that's a clear way of preventing  
5 what happened to Mr. Norris.

6 And those would be our points and we have nothing  
7 further.

8 MR. CHIEF JUSTICE BURGER: Thank you, Mr.  
9 Rindskopf; thank you, Mr. Castellani. The case is submitted.

10 (Whereupon, at 1:02 o'clock p.m. the argument in  
11 the above-entitled matter was concluded)  
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