In the

Supreme Court of the United States

MARTIN DIES, JR., et al.,

Appellants,

v.

VAN PHILLIP CARTER, et al.,

Appellees.

No. 70-128

Washington, D. C.
November 17, 1971

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v.	:	No. 70-128
VAN PHILLIP CARTER, et al., Appellees.	:	

Washington, D. C.,

Wednesday, November 17, 1971.

The above-entitled matter came on for argument at 1:16 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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:

JOHN F. MOREHEAD, ESQ., Special Assistant Attorney General, 900 Perry-Brooks Building, Austin, Texas 78701, for Democratic Party, an Appellant.

PAT BAILEY, ESQ., Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, for Texas, an Appellant.

A. L. CROUCH, ESQ., 109 North Taylor Street, Fort Worth, Texas 76102, for Appellees Wischkaemper and Jenkins.

APPEARANCES (Continued):

JOSEPH A. CALAMIA, ESQ., 608 Southwest Center,
El Paso, Texas 79901, for Appellees Pate and Guzman.

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C O N T E N T S

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PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 128, Dies against Carter.

Mr. Morehead, you may proceed.

ORAL ARGUMENT OF JOHN F. MOREHEAD, ESQ.,

ON BEHALF OF THE APPELLANTS

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

My name is John Morehead, and I am here on behalf of the Democratic Party of the State of Texas.

This case involves the constitutionality of political party filing fees as an absolute prerequisite to getting on the Primary ballot.

This is an appeal from a duly constituted three-judge court. The court below held that filing fees violate the First Amendment and the due process clause and the equal protection clause of the Fourteenth Amendment, when used either as a revenue-collecting device of when made an absolute requirement in order to get on the ballot.

There were intervenors in this case who desired to vote for the candidates who did not have the filing fees.

Judge Taylor, writing for the three-judge court, decided that since the intervenors wanted to vote for these particular candidates, that this was really a voters' rights case, and that therefore, in order for the State to sustain its laws, we had to

meet the burden of showing a compelling State interest.

Our position is that the primary question before this Court is whether or not the traditional rational relationships of the Fourteenth Amendment applies to this factual situation, or whether or not the State must show a compelling State interest in order to sustain its laws.

To begin with, let me say that I consider the issues involved in a nominating primary for political parties to be difference from those issues which are involved in a general election.

The reasoning of Mr. Justice Stewart in Turner v. Fouche -- I think that's the correct pronunciation -- seems to me to indicate that a filing fee as an absolute prerequisite to stand for office in a general election would amount to invidious discrimination.

The first question to be decided here today is whether or not the primary should be treated exactly like a general election.

There is language in a 1944 case, Smith v. Allwright, which Mr. Justice Marshall is very familiar with, which indicates that the answer to my question is yes. In Smith, Mr. Justice Reed said: when primaries become a part of the machinery for choosing officials, State and national, as they have here, the same test to determine the character of discrimination as abridgement should be applied to the primary as are applied to

the general election.

The Court in Smith was talking about a State statute which fenced off the rights of otherwise qualified black voters to participate in a Democratic Primary. Since the decision of this Court in Smith, many cases have come before this Court, which involve both voter rights and candidate rights. The issues and problems have been definitionally refined, to the extent that I think that if Smith were to come before this Court today, I believe that the Court would probably, would obviously reach the same result, but would probably use a little bit different wording than was used in Smith.

I feel that it would be much more similar to -- for example, the case of Kramer vs. Union Free School District.

In order to get an accurate perspective of the issues in this case, a brief sketch of how Texas elections systems work will be helpful to the Court.

The primaries are held in May, and under the laws that exist today the payment of the fee is an absolute requirement to get on the ballot. No write-ins at all are permitted on the primary ballot.

In November the election is free, no fees are charged at all in the State of Texas.

Q Who is eligible to vote in a primary election?

MR. MOREHEAD: Everyone. You can only vote in either -- there's a law that says you can only vote in the Democratic

Primary or in the Republican Primary, but all qualified voters are eligible to vote in the primary elections.

Q In one or the other of them?

MR. MOREHEAD: That's right.

Q They don't have to show anything about their party affiliation?

MR. MOREHEAD: No, sir; they do not.

At the top of the ballot is printed the words which say that "I pledge to support the nominees", but of course no way that that could ever be enforced.

And also in our November election we have a much, much easier method for independent candidates or independent parties to get on the ballot than the Court was faced with in the recent case of Jenness v. Fortson.

There this Court held that five percent was all right. In Texas it's one percent of the people for a Statewide election and for local elections it's also one percent, except there's an absolute maximum. You can't ever have to have more than 500 signatures in order to get on the November ballot. And so, as the Court is aware, this is a consolidated case involving three different candidates who desired to get on the election. The two local candidates, the one for County Judge in Fort Worth and the one for County Commissioner out in El Paso, both of which counties have population in excess of 300,000 people; only needed 500 people on the petition in order to get on the November ballot.

We think that a primary --

Q Any -- excuse me -- any other substantial limitations or requirements with respect to the getting on the ballot by petition. Do the signers have to be people who have not voted in either primary, for example?

MR. MOREHEAD: No. No. They just get one percent of the people that form to support an independent candidate.

Q And by one percent of the people you mean one percent of the eligible voters?

MR. MOREHEAD: One percent of the eligible voters, not one percent of the people that voted in the last election; but one percent of the eligible voters.

Now, the State thinks that a political primary is an extension of the right to vote, similar to which this Court was faced in the McDonald case, involving the absentee ballot for the inmates of the Cook County prison.

In a primary you get to vote a second time. Not only do you get to vote in November, but you also get an opportunity to vote in May, and we therefore submit that this is an extension, and that also you can see the candidate gets the right to run twice. For example, Mayor Lindsay lost in the Republican Primary, for Mayor of New York, and was able to come back as an Independent in November, and still win the election.

We submit that the footnote in Kramer by Mr. Chief Justice Warren, which points out the distinction between a fencing-

off case, as happened in Kramer, where the man wasn't eligible to vote at all, and the type of case that you have in McDonald, which is an extension of the voting rights, is a distinction which this Court should apply in this case.

And that the three-judge court, when they applied the rational relation test -- I mean when they applied the compelling State interest test to the laws of the State of Texas, they just simply used the wrong test.

And that, therefore, if it were not for the press of the fact that we have new primaries coming up in 1972 and new deadlines to meet, that the proper disposition of this case is really a remand to the three-judge court to apply the proper test to the Texas laws.

We submit, of course, that the rational relation test is the one which this Court should use.

Now, even applying the rational relations test, we are still faced with the problem of: does this filing fee, as an absolute requirement to get on the primary ballot, which is a part of the election process, constitute invidious discrimination?

If the rational relation test applies, then we submit that the Court could look -- should look to the other side of the question and what purposes does the fee serve.

The fee serves two purposes to the State of Texas: first, it serves the purpose of regulating the ballot; and,

secondly, it serves the purpose of financing the actual cost of the election itself. In other words, the candidates pay all the cost of printing up the ballots, paying the voting officials, all of the other incidental things, renting a place, we use the public schools most of the time to hold the elections in, give them the pencils, renting the voting machines from the county, and all of these matters. This is taxed to the candidates and not to the States.

On the face of this, both of these reasons would appear legitimate, but we still must look to the question of whether they have the effect of classifying and effectually excluding from the electoral process people who are unable to pay the fee.

Q Mr. Morehead, why wouldn't you do that on the general election, then, too?

MR. MOREHEAD: I'm sorry, I don't understand the question.

Q Why wouldn't you split the cost of the general election among the candidates who are on the ballot at the general election?

MR. MOREHEAD: To me, inherent in our Constitution, both the United States Constitution and the State Constitution, we have an elective process; that's the way we select our public officials is through election. The ultimate election, since that's the way we're going to run our government,

it seems to be must be borne, the cost of that must be borne by the State, and that someone who is unable to pay the fee there, Mr. Justice, obviously must have the opportunity to stand for ultimate election. And it might be a legitimate purpose to help finance it that way, but you certainly could not exclude someone from a general election in November because of his inability to pay this fee.

Q Well, all I'm saying is, isn't your argument equally applicable to the primary? How do you differentiate between the primary and the general election? When you argue this way, and in addition you say that the primary is an extension of the general.

MR.MOREHEAD: Well, it seems to me that you first need to look historically at the problem of the primaries. The primaries weren't there when we first started to hold elections in this country, and, as I understand it, some States still nominate through convention, as opposed to through primaries.

And the fact that someone is unable to get on the ballot in the primary election doesn't necessarily mean that he can't get elected; whereas, if he's unable to get on the ballot in November, he's -- the door is closed, he's foreclosed from any possibility of -- for election.

Does that respond, sir? That's the response I have.

Q Well, it's the only one I can think of, too.

And I just wondered what you --

MR. MOREHEAD: Well, I've been thinking on the problem a considerable bit of time.

Q If the costs were of great concern, I suppose the cost of the general election is substantially more than the cost of the primary, is that so?

MR. MOREHEAD: In terms of total cost, it's not, sir. The reason being that in Texas we hold two primary elections and only one general election, and therefore you've got to have two sets of officials, and -- if you're going to hold them in different places -- and two sets of ballot boxes, for example, or two sets of voting machines; whereas, in the general election you only have to hold one of these.

One of the problems which I think needs to be considered is the rational relation test does apply, or what are the alternatives?

Q Well, what was the District Court's excuse for applying a more strict test? Did it base its holding on the First Amendment?

MR. MOREHEAD: Yes, sir.

Q Do you challenge the holding that the First Amendment is relevant to -- it protects the right to run for a State office?

MR. MOREHEAD: Not the ultimate right to run, no, sir, I don't think -- I mean I do think the First Amendment does

protect the ultimate right to run for State office.

Q Are there cases like that here?

MR. MOREHEAD: Not that I have seen, but it's just an abstract proposition. I would think that the privileges and immunities clause would get the First Amendment back in and apply it to the States on that. If I'm saying that correctly.

What the three-judge court based their reasoning on, sir, was this: They said that --

Q Well, I can understand why they did it if they thought the First Amendment was involved.

MR. MOREHEAD: Right. They said that this was a voter right question, since voters wanted to vote for a particular candidate, that, therefore, this was a voter question and not a candidate question and that, therefore, the right to speak and vote --

Q Well, is that right to vote in State elections protected by the First Amendment?

MR. MOREHEAD: I would have thought that it probably was, but I --

Q The federal right to vote, under the First Amendment, in a State election?

MR. MOREHEAD: I just would have to be frank and say that I don't know the answer to that question. On first blush, I would think so, but I must plead ignorance to that.

If we want to find another way to regulate the size

of our primary ballot, other than fees, we are reduced ultimately, I think, to a petition which, to me, -- in other words, you have to show some sort of modicum of support in order to get on the primary ballot because, otherwise, you face the very real problem of 500 people filing for the offive of Governor of the State of Texas. It's not quite the same problem as Mr. Justice Black said in Williams v. Rhodes. There he talked about the theoretical possibility of the proliferation -- if I can get all those words right -- of political parties.

And I think that the theoretical possibility of proliferation of candidates is a much more real problem than the possibility of having a whole lot of political parties.

Q Other States handle this problem without requiring these rather large fees, don't they?

MR. MOREHEAD: Yes, sir; they do.

Q By requiring a certain number of signatures on a petition or by --

MR. MOREHEAD: Some do it by petition, others have just not ever met the problem. The most serious situation, I think, arose in the State of Michigan one time, where they did end up with 700 people on a primary ballot.

Q These fees can go up to close to $9,000.

MR. MOREHEAD: Yes, sir, they certainly can. It's expensive to hold an election.

Q And this is just for a county office. $9,000

fee to --

MR. MOREHEAD: Well, for the District Judge's office, which is a county office in the larger metropolitan areas.

Q And I notice that the statute, 13.08(1) says that the costs of the election are to be apportioned by -- what is it, the committee or the chairman?

MR. MOREHEAD: Yes. It's the County Committee.

Q Yes. And that's the County Party Committee, the Democratic Committee or the Republican Committee?

MR. MOREHEAD: Yes, the particular party committee.

Q And the committee shall apportion such cost in such manner as in their judgment is just and equitable among the various candidates for nomination for District, County, and Precinct offices as hereinafter defined, and so on.

And in making the assessment upon any candidates, the committee shall give due consideration to the importance, emolument and term of office for which the nomination is to be made.

Are there any rules of thumb developed as to the amount of these fees, or each year does the committee --

MR. MOREHEAD: Each year they set them, on their own original basis. Now, in this particular case, this $9,000 fee to file for District Judge, they -- what they do is try to collect enough money to pay for the election and then after its over they rebate the excess proportionately, depending on

what fee you paid. In this particular case they rebated 57 percent. In other words, if you look at it from the bottom up, they missed it more than 100 percent on the amount that -- and there, I think that if a candidate had come into the State courts and said that this particular County Chairman or this particular County Committee abused their discretion in the amount of this fee they set, I think you'd have gotten some redress in the courts of the State of Texas on that matter.

Q Well, on that matter, ultimately they just paid the actual costs?

MR. MOREHEAD: That's right. Ultimately they just paid the actual cost, and ultimately all of them divided on the amount of payment made.

Q When you are up against the filing date, you don't really know whether you're going to get a refund.

MR. MOREHEAD: Well --

Q So you've got to put up $9,000, is that it?

MR. MOREHEAD: That's correct, sir.

They always try to get more because, for a losing candidate they have a particular amount of trouble collecting money from him.

Q How many candidates were there for the District Judge?

MR. MOREHEAD: The only way to answer that would be how many were unopposed. And in Tarrant County I think there are

eight. The people from Tarrant County can answer that question. I think all but one of them was actually unopposed in the Democratic Primary.

Q Were they each unopposed?

MR. MOREHEAD: Two.

Q They had still to post $9,000?

MR. MOREHEAD: Yes. The unopposed candidates have to.

Q What's the salary of the District Judge?

MR. MOREHEAD: The District Judge's salary would be about -- there's two different ways you pay for it. One, the State pays a basic amount, which is now $21,000, and many counties vote an additional emolument, most of them run it up to about $25,000.

Q What's the term?

MR. MOREHEAD: The term is four years.

Q Do the fees ever exceed the salary of the office? Any office?

MR. MOREHEAD: I think there is one example of that, where there is a County Weigher, where there was a $50 fee, and he doesn't get paid anything.

(Laughter.)

But that's the basic fee. Each fee -- each person has to pay a $50 filing fee, and then later on, after you find out how many contested races you have, and how many candidates you have, then, after the filing deadline, is when there is an

additional assessment fee that is levied.

Q Do you suppose the filing fee had something to do with the fact that seven or eight of the judges were not opposed?

MR. MOREHEAD: Yes, sir, I do.

Q Does the -- is there a fee if one runs for a Statewide office?

MR. MOREHEAD: Yes, sir. But these fees are different. The Legislature is the one that passes these laws, and so therefore the cost to run for a Statewide office somehow seems to be less than it does to run for the others. And counsel for Mr. Pate has said that this is a discrimination in itself. They charge $150 to run for the State Legislature, $1,000 to run for Governor. That's the maximum for a Statewide office, $1,000.

Q And that goes to the --

MR. MOREHEAD: That goes into the Party cost.

Q Not to the State?

MR. MOREHEAD: Not to the State.

Q Is there any accounting required by the --

MR. MOREHEAD: Yes.

Q -- other party to the State?

MR. MOREHEAD: To the Secretary of State, yes, sir.

Q For public accounting?

MR. MOREHEAD: Right.

Q The receipts and expenditures.

MR. MOREHEAD: Right.

The other alternative that I would like to pose before I sit down is, if the candidates don't finance these party primaries, who must finance it? The other alternative is that of course you need make the counties and the State itself finance these particular elections. And to say that the States must themselves finance it, and that that's part of equal protection under the Fourteenth Amendment is quite a different thing, as saying that the Legislature can finance it itself if it so desires.

In other words, to say that the State must finance it is to say that somewhere in the equal protection clause there is some sort of affirmative language which says that the State must act, that the State must hold this primary election, and finance it themselves. Because I think that ultimately, whether it's a $50 filing fee or a five-cent filing fee or a $9,000 filing fee, that the filing fee itself, because you're always going to run into that one person or that group of people, that the $50 is just as important to as -- or the $5 would be just as important, or as Mr. Justice Douglas said in Harper, that the $1.75 on the Virginia poll tax doesn't really any valid relation to the man's ability and right and qualifications to stand for office, or to vote for that particular matter.

Q Do you understand, Mr. Morehead, that the District Court held that these, first of all, that these fees are

unconstitutional only as applied to people who could not afford to pay them?

MR. MOREHEAD: No, sir. In their opinion, the court said that it's unconstitutional in two respects: No. 1, it cannot be used -- they use the words, "revenue-raising device". It's not a revenue-raising device in the sense that it goes into the State coffers like the poll tax used to.

Q It's to pay the cost.

MR. MOREHEAD: It's to pay the cost of it. They said you could not use filing fees to pay the cost of the election. And, No. 2, they said it could not be made an absolute requirement to get on the ballot.

Q Well, by the use of that word "absolute", do you think they implied that a person who could afford this fee could be required to pay it, but somebody who --

MR. MOREHEAD: Filed a -- excuse me.

Q -- couldn't afford the fee could file in indigency?

MR. MOREHEAD: I read it that way, yes.

Q And on --

MR. MOREHEAD: But, on the other hand, when you see the requirement that our State Legislature put on the affidavit of indigency in their last legislative session, that's obviously got to be bad. I mean they --

Q Mr. Morehead, I have difficulty with your answer

to Mr. Justice Stewart. You said to Mr. Justice White earlier, that the concluding paragraph of the opinion seems to rest this squarely on First Amendment grounds, without reference to any equal protection or other basis for the decision. Am I wrong about that?

MR. MOREHEAD: I was -- had reference, sir, to -- I'm looking at the jurisdictional statement, where the opinion is printed --

Q That's what I'm looking at.

MR. MOREHEAD: -- at page 10a in the back. The top sentence of the court. Now, he says in the second sentence: We have limited our decision here to say that a filing fee violates the First Amendment and the due process clause and the equal protection clause of the Fourteenth Amendment when it is used as a revenue-collecting device -- that's what I thought the court really held.

Q I see. And this last paragraph says: In granting declaratory relief, there's no difference.

Certainly the last paragraph rests, does it not, squarely on the First Amendment?

MR. MOREHEAD: Yes, sir. And squarely on the voting rights problem as opposed to the candidate problem.

Q And if it rested, on page 10a, on the First Amendment and equal protection, it doesn't help very much that the equal protection is also added, if the payment of a

fee violates the First Amendment.

MR. MOREHEAD: That's --

Q Does it make any difference between this as opposed --

MR. MOREHEAD: That's correct. I see -- if we have a First Amendment problem and a compelling State interest problem, then these statutes ultimately must follow. I think that's the really proper --

Q You don't know of any cases where the First Amendment has been applied to guarantee someone -- except this one -- the right to run in an election for State office?

MR. MOREHEAD: No, sir, I don't. I will research the problem and --

Q All right.

Q You understand, then, the court's holding, at least its reasoning in the final paragraph of the opinion, would hold unconstitutional any filing fees of any kind, the $10 fees?

MR. MOREHEAD: The ten-cent fees. That's the way I read it.

Q And required of anybody, no matter if he were a multi-millionaire, is that it?

MR. MOREHEAD: That's right. That's what I really ultimately -- I didn't think that that's what they're really resting it on, since they had said it back at the first, and

it's just a guess there, to answer that question.

Thank you very much.

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

Now, is Mr. Bailey going to be in rebuttal?

MR. BAILEY: Yes, Your Honor, I am.

MR. CHIEF JUSTICE BURGER: Very well.

And you're Mr. Crouch?

MR. CROUCH: Yes.

MR. CHIEF JUSTICE BURGER: Mr. Crouch, you have 20 minutes.

ORAL ARGUMENT OF A. L. CROUCH, ESQ.,

ON BEHALF OF APPELLEE WISCHKAEMPER

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

I would like to point out that the background of the filing fee is that it was designed, along with the poll tax, to exclude blacks from the party primaries in Texas. The poll tax was adopted into the State Constitution in 1902, and the filing fee was adopted by the Legislature in 1911.

In United States vs. Texas, Judge Thornberry said that one of the main purposes of the poll tax was to disenfranchise the Negro voter. And we maintain that the purpose of the filing fee was to finance these white primaries, which have been to the Supreme Court of the United States five different times.

Now, the very fact that words indicating race are not mentioned in the statute doesn't mean that race cannot be in the picture, because the very act of adopting an economic status standard for a person who seeks elective office is automatically placing a race standard in effect.

Q Well, are you arguing a different basis for sustaining the judgment below than the court used?

MR. CROUCH: No, Your Honor, --

Q I would think you shouldn't do that, but I just wondered.

MR. CROUCH: I pointed out in my brief that the filing fees tend to keep indigents from filing.

Q Now, this is an equal protection argument?

MR. CROUCH: Yes. But it also -- when you talk about indigents, you're talking more about minority parties than you are whites, and you're talking more about women than you are men.

I have some tables in my brief to illustrate that.

Now, in Texas, in addition to the blacks, we have the browns, and Mr. Morehead pointed out that it's fairly easy to get on the election ballot in the general election as a write-in candidate.

Well, in the brief filed from El Paso, there is a table over in the back showing write-in candidates in November 1970 general election, the last page, 86, and there were 398

write-in votes.

So that is an exercise in futility to attempt to get on the general election ballot as a write-in candidate.

Q I think Mr. Morehead was not talking about write-in votes at a general election, but getting your name on the ballot in the general election --

MR. CROUCH: Yes, sir.

Q -- by a nominating petition of one percent.

MR. CROUCH: That's as a third party. And a group attempted that last year, called "La Rossa de Neitha"(?) and the Supreme Court of Texas turned them down over a technicality.

Q What was the technicality?

MR. CROUCH: Yes. And a dissenting -- sir?

Q What was the technicality, that they had less than one percent?

MR. CROUCH: No. They apparently had enough percentages, and at least one or two counties. They were trying to get on in five counties, if I remember correctly.

There was a dissenting opinion which indicated that this group was acting in good faith, but they had conflicting opinions of what the statute meant from two or three different State officials, and nobody understood what the statute was. And so they were not allowed on the ballot.

Q But, in any event, Mr. Morehead was not talking

about write-in votes at a general election, but was talking about a man's ability, or, as you say, inability to get his name on the ballot at the general election --

MR. CROUCH: Right. In the third-party column.

All right, now, bringing that down to the county level, he mentioned the figure of 500 signatures as a maximum. That's true. But since this case has been decided, the Legislature of Texas has done a remarkable plastic surgery job on the face of the statute. They've enacted what's called House Bill 5.

And I'm not sure when the bandages come off, but I think January the 1st.

In that particular House Bill 5, the requirement to get on as a write-in candidate is ten percent of the people who voted for Governor in your party at the last general election, which, in Tarrant County, would be 6,211 signatures. And they have to be sworn to before a notary. And the notary in Texas is entitled to a 50-cent statutory fee, which would mean over $3,000 just in notary fees to get the signatures.

Now, that's not 500, which is all it requires to get on as a third-party candidate; but over 6,000 to get into the Democratic Primary as a write-in candidate.

And in addition to that, you have to sign and swear to a pauper's oath, and humiliate and degrade yourself by helping to establish and perpetuate a caste system. I don't

see any need for that, but there it is.

Q There is legislation, conditional legislation enacted by the State Legislature which comes into effect depending upon the result of this issue --

MR. CROUCH: Yes, Your Honor.

Q -- by this Court?

MR. CROUCH: Yes.

Q Is that set out in full somewhere? I saw it was referred to.

MR. CROUCH: Yes, it's attached as an exhibit in the State's brief.

Q In the State's brief?

MR. CROUCH: Yes, sir.

Now, it's also a temporary measure that expires at the end of 1972, so nobody really knows what it means.

Now, with reference to Mr. Morehead's statement about two sets of voting officials. The Secretary of State himself, who is the chief election officer for the State of Texas, has recommended in a message to the last Legislature that a unitary primary system be established and that it be paid for out of tax funds by the county and by the State.

And so we would eliminate some of the cost of having the duplicating primaries, if that recommendation is followed.

Now, I maintain, and I have all throughout, that the filing fee is a poll tax imposed on a citizen who wants to

run for office and vote for himself.

Now, in Texas, you have what is called a cost deposit of $50 for a person who wants to run for county office. He pays that at the same time that he files his application to run.

Then, after the executive committee has had a chance to meet and make the party assessments, he has to -- at that time he has to ante up additional sums of money running up into several thousand dollars.

This last year in Tarrant County the filing fee assessed by the executive committee of the party was 32 percent of the annual salary, which is a very large sum of money. And, as Mr. Morehead pointed out, of the 25 Tarrant County officials on the primary ballot in the Democratic Primary last year, only two of them had opponents because of these high filing fees.

And of the total of over $200,000 received by the chairman of the Tarrant County Democratic Party in 1970, 77 percent of that money came from the incumbents themselves. There was nobody else who could afford to pay, and it's outside of the record, but of course many of them found difficulty in paying it, too.

Q Do you understand the holding of the District Court in this case to have been that these fees are unconstitutional only as applied to those who cannot afford to

pay them?

MR. CROUCH: I think not. I think they are unconstitutional to everybody. Even as the poll tax is unconstitutional to everybody.

And with reference to the poll tax once more, I would like to remind the Court of Harman vs. Forssenius. In that case, it was a Virginia case, the Twenty-fourth Amendment had been adopted outlawing the poll tax in federal elections, and the State of Virginia, to get around this ruling, passed a statute that made it possible for anybody who wanted to avoid the payment of a poll tax to file an affidavit instead. And the affidavit testified that the person had been a resident for so many months and that he intended to remain a resident throughout -- until the election was over.

Now, you see, in our case we have Harman vs. Forssenius all over again, except instead of one affidavit we have to file 6100 affidavits. And I think that's 6100 times as bad as Harman vs. Forssenius. Of course, I'm prejudiced in the matter, because I've represented these people who just flat have not been able to pay the filing fees that have been demanded.

Q Well, so your clients, as I understood you, are people who cannot afford to pay this?

MR. CROUCH: That's right. And it was so stipulated by the other side.

There were three different plaintiffs in the case.

Q And all the plaintiffs in this case, --

MR. CROUCH: Right.

Q -- in these three consolidated cases, were people who alleged that they could not afford to pay the fee; is that correct?

MR. CROUCH: That's right. Two of them are law students, incidentally.

Q So that I wondered how you understood the court's decision, just that the fees are unconstitutional only as applied to those in your clients' position?

MR. CROUCH: No, sir; as applied to all.

Q As applied to everybody?

MR. CROUCH: That's my understanding, yes.

Q Do you further understand the court to have held that all fees would be unconstitutional, even a one-dollar fee?

MR. CROUCH: Well, there is the question of a low and narrow fee. There's some sort of hesitation on the part of Judge Thornberry, if I remember correctly, and he was concerned about the Weatherington case over in Florida, which held that reasonable filing fees may be constitutional. And I think he was trying to take that ruling into account, when he said that possibly a low and narrow fee might be constitutional. He didn't say it was.

Q He didn't write the opinion, did he?

MR. CROUCH: Sir? He wrote the concurring opinion.

Q Oh.

But the court's opinion doesn't talk about that, does it?

MR. CROUCH: No, sir. And the Court asked a while ago about -- was there any First Amendment case other than ours, and the Duncantell case, which was decided in Houston on October the 27th, specifically says that the right to run for elective office is inextricably woven into the fabric of the First Amendment.

And one of my co-counsel here has pointed out to me that Williams vs. Rhodes also was decided on the basis of the First Amendment.

But it would seem to me that the First Amendment is much more important in this particular -- pardon me.

Q Williams didn't -- I might suggest Williams v. Rhodes talked about the right to associate.

MR. CROUCH: Right.

Q But it didn't put the right to vote on the First Amendment.

MR. CROUCH: Well, the right to associate is a part of the First Amendment.

Q I agree with that, yes.

Q Incidentally, I notice at page 161 of the record

the judgment of the three-judge court makes it explicit that the section was declared unconstitutional, and its enforcement enjoined, I gather as to everybody; and that the declaration of unconstitutionality is rested only on, because they infringe upon First Amendment rights without any compelling justification in violation of the First and Fourteenth Amendments. Is that right?

MR. CROUCH: Yes, sir.

Q So I gather, at least on the face of the judgment that was entered here, it rested on the First Amendment -- correct?

MR. CROUCH: Yes, sir.

Q And secondly, it enjoins its enforcement as to everybody, not merely as to your impecunious clients. Is that right?

MR. CROUCH: That's right. The whole State of Texas and the political parties are all enjoined.

Now, with reference to the standard to be employed. As I understand it, there are three different standards that can be employed. The first is whether or not the articulated State goal can be accomplished in some less drastic means than the one employed by the State.

And under Kramer that question needs to be answered first before you go into the question of whether you apply the compelling justifications test or the rational interests

test.

And I take the position that there is another less drastic way of regulating the ballot in nominating petitions, and there are 34 offices included on the Tarrant County ballot in 1970, which is given in one of the exhibits in my brief, and 21 of those offices could come off the ballot if we had legislation permitting single-member legislative districts and single-member judicial districts for Tarrant County.

That, coupled with the nominating petition, I think would be a less drastic means than a filing fee to regulate the ballot.

But coming back to Harper, the Harper claim they say is that any fee is per se unconstitutional because it's irrelevant, the man's economic status has no relevancy whatsoever to his qualifications as a write-in.

And Mr. Morehead pointed out the case from Georgia, the Turner vs. Fouche case. He mistakenly said that that involved a filing fee, when actually it did not; it required an ownership of real property.

But I think that the ownership of real property is equivalent to the ownership of personal property, except in Texas the State takes the personal property and the State of Georgia allowed the man to keep his one square inch of real property.

Shelton vs. Tucker, "the breadth of legislative abridgement must be reviewed in the light of less drastic means for achieving the same basic purpose."

Williams vs. Illinois, Mr. Justice Harlan, in a Circuit opinion concurring: "The matrix of recent equal protection analysis is that the rule of statutory classifications which either are based upon certain suspect criteria or affect fundamental rights will be held to deny equal protection unless justified by a compelling government interest", citing Shapiro, Harper, and Williams.

And in this case we not only have the fundamental constitutional right to run for elective office, but its concomitant the fundamental constitutional right to vote for the candidate who wants to run; and in addition to those two fundamental constitutional rights which are involved, we have also this suspect legislative criterion of poverty.

We have the filing fee which limits the place on the ballot to the man with money. And this means that his economic status has become a qualification for office, and all of the three offices involved here are offices where the qualifications are set by the Constitution of the State.

And it's beyond the power of the State Legislature to amend the Constitution of the State and pass additional requirements. And economic status is absolutely irrelevant.

The Edwards case held this. Recently the Graham case

has held it. And in the Graham case, if I remember the case correctly, there was a case involving aliens, and the court said that an alien had this right regardless of his nationality to welfare benefits, and it was very important that he should have it.

In our case we're not representing aliens, we're representing American citizens, and American citizens who are not asking for a handout, they're not asking to go on the welfare rolls, they don't have any money but they're asking for a job, they're asking for a right to be considered for elective office, which, under Turner vs. Fouche, I think they have a basic fundamental right to be considered for elective office without these other qualifications which are absolutely unconstitutional.

Q I notice in Judge Thornberry's concurring opinion that he says, among other things, "voters are deprived of the opportunity to have their candidate considered for the Democratic Party nomination if he cannot post the filing fee", and he goes on, "Since in the overwhelming majority of Texas political offices nomination by the Democratic Party is tantamount to election, it is clear that restriction on entry into the primary may significantly impair the right to cast one's vote effectively", and so on.

"And they are precluded by the high filing fee from associating within the established party."

MR. CROUCH: That's right.

Q Does this imply that this law is only applicable to the Democratic Party and not the Republican Party?

MR. CROUCH: No, sir. The opinion there says that the political parties, plural, of the State are enjoined.

But let me point out that in my candidates' particular race there were no Republican candidates at all. If I remember correctly, there were only -- the candidates in Tarrant County, Texas, only fielded candidates in four races, four County races out of 30-some-odd.

Q That is the Republican Party did?

MR. CROUCH: That's right.

Q Do they hold a primary, or do they do it by convention?

MR. CROUCH: Well, they hold one. If a party gets a certain number of votes in the November election, they have to hold a primary. But the Republican Party is not able to collect these filing fees, because their nomination really isn't worth an awful lot, and they have to use volunteer help at the polls, whereas the workers in the Democratic Primary are paid two dollars an hour out of the filing fees.

Q So the Republican Party doesn't require these fees?

MR.CROUCH: Yes, they have fees. But quite frequently they return the fees and don't use them. But mostly they try

to use volunteer help. And quite frequently they don't use the voting machines, because the paper ballots are cheaper.

There's a newspaper clipping from the Dallas Morning News in the El Paso brief, which I'd like to refer the Court to,explaining the problems with reference to the Republic Party.

But if the Secretary of State's recommendations to --

Q Senator Tower didn't have too much trouble, did he?

MR. CROUCH: Pardon?

Q Senator Tower didn't have too much trouble, did he?

MR.CROUCH: Well now, this was a Statewide race. The Republicans are able to win Statewide --

Q Yes, but I mean you complain that there's only one party down there.

MR. CROUCH: Except in Statewide races.

But if the filing fees go out, and the recommendations of the Secretary of State are followed by the Legislature, and we have a unitary primary, then we would have greater participation on the part of all; because everybody will go to the same place to vote, just as in November. The Republicans will go to this machine over here, and the Democrats over here. And it will all be paid for out of tax funds.

Q And this will be done if what?

MR. CROUCH: If the recommendations of the Secretary of State, who's on the other side of this lawsuit, are carried out.

Q Is that in the form of a bill now before the Legislature?

MR. CROUCH: It was a message, a special message, and it's included as an exhibit in the El Paso brief. And we heartily concur with his recommendations.

Q Mr. Crouch, I'm a little confused. Is there any division of opinion among the State office holders of Texas on this suit?

MR. CROUCH: Well, certainly.

Q Some are on one side, some on the other, are they not?

MR. CROUCH: Well, nobody has intervened on our side. To be perfectly frank about it, it's not politically expedient for an office holder to become involved in a controversy of this nature. He loses votes no matter what he does. It's a hot potato. And you'll find that they're not here unless they've been sued.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Crouch, your time is up.

MR. CROUCH: Thank you, sir.

MR. CHIEF JUSTICE BURGER: Mr. Calamia.

ORAL ARGUMENT OF JOSEPH A. CALAMIA, ESQ.,

ON BEHALF OF APPELLEE PATE

MR. CALAMIA: Mr. Chief Justice, members of the Court:

I believe that, broadly stated, the issue here is whether there should be the opportunity for equal participation in the electoral process by candidates with or without money --

MR. CHIEF JUSTICE BURGER: Go ahead, counsel. The situation is under control, at the present time.

MR. CALAMIA: I will restate it. I believe broadly that the issue here is whether there should be the opportunity for equal participation in the electoral process by candidates --

MR. CHIEF JUSTICE BURGER: You may suspend for a moment.

(Disturbance in the courtroom.)

MR. CHIEF JUSTICE BURGER: Apparently we have a sick man on our hands, counsel. You may resume your argument.

MR. CALAMIA: Broadly stated, Your Honor, I believe the issue here is whether there should be the opportunity for equal participation in the electoral process by candidates with or without money, or who refuse to pay. I don't believe that -- and I don't fully concur with the opinion of the lower court. I think that opinion is too reserved and too conservative in our political way of life, in our democratic

political way of life.

Q Well, didn't all counsel up to now make it clear that it applies to everyone whether he can afford to pay or not?

MR. CALAMIA: The reason --

Q No one can be required to pay a fee?

MR. CALAMIA: Well, the reasoning, Mr. Chief Justice, is what I disagree with, and that it limited it only on First Amendment rights is what I'm saying.

My position is that the right to run for office is as much a fundamental right as the right to vote, under the First Amendment to the United States Constitution, which guarantees political association, and that that right should not be impinged upon.

That is my position, and I think that if that is followed it would eliminate exactly what is happening in Texas under this system; and that is a monopoly in government itself is what exists down there.

There's a monopoly because it is a government by the selected, for the selected and of the selected. And I submit to the Court that the crux of the issue is whether the classification here, which limits the right to vote or seek public office as a candidate, is per se unconstitutional under the First Amendment, which is the right to freedom of political association and equal protection that candidates --

I'm speaking for the voters' rights as well as the candidates' rights.

This was -- like in Rhodes, there there was a discrimination between parties, and in that case, as Justice White inquired: Is there a case from this Court that talks about First Amendment rights in connection with the right to run for office?

And it did. That's the case where they talk about First Amendment rights as a right to run for office.

Now, I agree that the equal protection clause of the Fourteenth Amendment permits the States to make classifications and it does not require them to treat them uniformly; nevertheless, it bans any invidious discrimination. And that's exactly what is involved in this case: invidious discrimination; unfair discrimination.

The primary election is an organ of the State and, as stated in that case by -- in the Allwright case, when primaries become a part of the machinery for choosing officials, State and national, as they have there, the same test to determine the character of discrimination be applied to the primaries as are applied to the general election.

The general election, Your Honors, and Mr. Chief Justice, merely confirmed the discrimination that exists in the primaries. And the alternate about petition for independent is not a reality in the political life. In fact,

in checking that section of the law, those people that voted in the primary cannot sign those petitions for candidates, non-partisan candidates that run in the general election.

Q I understood Mr. Morehead to --

MR. CALAMIA: -- make the opposite statement.

Q -- state this differently.

MR. CALAMIA: Differently. But we checked it, and I was prepared for that. And if you'll check it, I believe I'm correct.

Q Do you have the statutory citation?

MR. CALAMIA: I don't have it with me. 1305, I believe -- 13.50.

So this is not like Georgia in Fortson, Justice Stewart, where the election process was wide open. This is freezing in the status quo: the ins are in and the outs are out. And that's why there's no opposition.

And this country is based on the political fluidity, I believe they say, in the electoral process. That's what this Court is very concerned with, that it is maintained. And that is just what this filing fee system prevents.

Q Of course if we go back to this country's beginnings, basis, in the early days many of the States required people to own property before they were eligible to vote, much less run for office.

MR. CALAMIA: Correct. And those concepts, of

course, have eroded. Just like Snowden vs. Hughes, it's no the law in this Court, since the incorporation theory from the First Amendment into the Fourteenth Amendment. And that's why I say Snowden is not controlling in this case whatsoever. It's totally inapplicable to the fact situation.

And under the broad principles of law that I believe should apply to this, to deciding this case, the -- it would be truly a representative democratic type of government.

These fundamental rights are involved here, both under the First and Fourteenth Amendments. We say there's invidious discrimination. We say there's First Amendment rights violated, the right to political association, from the voters' standpoint and from the candidates' standpoint.

And we also say that the classification is in that nature or neighborhood or criterion which is suspect: money.

It doesn't even say wealth or property, it says money; cash. And when that is involved, then this Court must, under its test, give it a careful scrutinizing examination and the State must show a necessary compelling interest for having such classification.

I don't think they can do -- I think they say in their brief, if that's true the ballgame is over. I say the ballgame is over and it's time to change.

And just briefly, interjecting House Bill 5 in here, which was not in issue, I'm going to ask this Court if it would,

if and when it makes its decision, to make it so broad that it's in favor of the appellees that we won't have to be coming up to this Court time and time again for relief, like we've done when they were trying to keep the black people from running in the Democratic Primaries, where five separate suits, one right after the other, had to be brought because Texas doesn't give up that easy.

I submit to the Court that this is a suspect classification, the compelling interest test applies. I further submit that the excuses and reasons that they give for this legislation are totally irrelevant to the achievement of the State's objective, that is of keeping the -- they say chaos will result. They say the ballots will be cluttered with a lot of non-serious and spurious candidates. That's speculative. That's remote.

The other States have worked that out, and the State can do it the same way. How? By a modicum of support petitions and not to couple it with alternatives: that one can pay -- one candidate can pay a fee and the other one can get a petition to show modicum of support. That's again violating the equal protection clause in the Fourteenth Amendment.

So I respectfully submit to the Court that if we are to envision the two concepts of government of the people, by and for the people, that the opinion of the lower court be broadened; affirmed but broadened on the First Amendment rights

and the equal protection rights.

That is, as to candidates, they have a right under the First Amendment to run for office, as long as they possess all other qualifications and there is shown a modicum of support for them.

I believe that's all I have to state.

MR. CHIEF JUSTICE BURGER: Very well. Thank you.

Mr. Bailey.

REBUTTAL ARGUMENT OF PAT BAILEY, ESQ.,

ON BEHALF OF THE APPELLANTS

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

I would like to say initially, in rebuttal, a comment or statement made in one of the briefs filed by the appellees: the statement says, "Texas, you finance your great universities, your schools, your tremendous highway system; why do you fight the financing of the most essential duty of government, when you know that the primary elections, for the most part, are tantamount to election?"

I think that this is one of the issues that comes up in this case, because what, in effect, the trial court, the three-judge court below has done is to completely do away with the financing system in Texas that we have for all of our election process, with the exception of the general election. They have, in effect, said Texas can raise the revenue or can

take care of it through some source.

Really, what in effect the court has done is to say that the State of Texas or lesser political subdivision in the State will now have to take over this function, since the political parties that wish to submit nominees for election on the general ballot are now doing it, so, in effect, forcing the State to expend moneys, to allocate their limited tax funds, or the local taxing bodies, limited to another project which, I think as you can see by the statement that they are rather expensive at times.

Now, this case really started out, I think it's kind of moved around and jumbled around a little bit, where it's really hard to see what we really have. It really started out with some particular candidates who did not have, they thought, adequate funds to pay the filing fees, challenging the right of this.

During the course of this case, certain voters intervened that said that "I'd like to vote for a particular one of these candidates". And actually what the court finally decided this case on was not the rights of the candidates here as to whether or not they had a right to be on the ballot without paying some sort of filing fee, but what they said is that you've infringed upon some voting-right principle of the voters.

Now, I think what you do here is that when we start

talking about these voting-right principles, we start talking about compelling interests, and this is -- again the court said that there is no compelling interest for the State to have allowed this type of situation in this particular case.

Well, I submit, in this connection, that possibly the court had used the wrong test in this case. They used one of these voting-principle cases to decide whether these fees -- was there any compelling interest to the State for these filing fees?

Q Mr. Bailey, could you charge for running in the general election?

MR. BAILEY: They do not, Your Honor.

Q I say, could the State of Texas constitutionally do it?

MR. BAILEY: I think, Your Honor, that -- you would have a bigger problem there, or would have one if you just made a charge. And I think this -- maybe it's tied in with what the court below said. They said that, having a filing fee --

Q But if you use the exact same filing fee in the general election, would that be constitutionally permissible?

MR. BAILEY: I don't know, Your Honor, that -- I think -- well, I'll put it like this: I think that possibly, maybe it would. I think that one that was based on cost of the election process would certainly be in a better situation than one, as the court below mentioned. They said a small or

reasonable -- they talk about a reasonable type of filing fee, as if some lower filing fee would be constitutionally acceptable. They said it would be permissible, it would be a legitimate, possibly even compelling function of the State.

I think what happens here is that --

Q So is it your answer that it might be?

MR. BAILEY: I think that if you put some type of filing fee on the general election --

Q The same fee as in this case.

MR. BAILEY: I think you might have some constitutional question there, Your Honor, but I think that --

Q Well, don't you have the same constitutional questions here?

MR. BAILEY: No, Your Honor, --

Q Where the primary is "an integral part" of the election machinery of the State of Texas.

MR. BAILEY: Yes, sir. But another part of this integral machinery is the fact that a candidate, if he wants to be on the ballot, in the general election, there is a process for getting on that will not cost him this filing fee.

I grant it is not a --

Q Well, won't it cost him something?

MR. BAILEY: No, sir, it will not.

Q Well, won't it cost him the paper for the petition?

MR. BAILEY: I presume it would cost him this, and

possibly the stamp or some of the other expenses of this nature, Your Honor.

But I think that when we start talking, as the court below did, that some other type fee other than this high one would be acceptable, to me this is incorrect, because I think that what more compelling or reasonable reason could the State have and to say "We're going to set these filing fees to where they will cover the cost of the election."

I think that to say it could be some other, lower fee, that had no basis of this nature, then it wouldn't be possibly even reasonable or compelling.

Q Mr. Bailey, one more question, aside from this: Why did you give us Exhibit A? What is the purpose of that?

To your brief.

It's that new statute.

MR. BAILEY: I think it was -- I don't know at the moment, I think that we were -- just put it in so the Court could see what had been done in connection with the situation that the trial court had -- or the court below had put us into, that the Legislature had to take certain action, and this was --

Q What did the Legislature have to do?

MR. BAILEY: Well, I think, Your Honor, --

Q What the Legislature did was to say if we don't do something they'll have already done something.

MR. BAILEY: Yes, sir.

Q Is that the only purpose of it?

MR. BAILEY: I think that --

Q I can understand why the Legislature did it, but I was just wondering why you, as an officer of this Court, felt obliged to bring it before us.

MR. BAILEY: You Honor, I think it's nothing more than to show what the Legislature had done, because I think we're in this area of filing fees in the election process, -- for the Court to know what we're trying to do, I think sometimes we don't know what guidelines to use, and if we're wrong in something, then it does give the Court opportunity to possibly see the way we're handling it, the way the Legislature is possibly going to handle it, and where, if we're incorrect, the Legislature will know what, next time, possibly to do to correct any of these things. And this is my only explanation for this.

Q The decision of the District Court was apparently in december of 1970.

MR. BAILEY: Yes.

Q So, have there been any elections since that time, or were there any this past November?

MR. BAILEY: No. The primaries will be coming up this spring, and then the general election in the fall.

Q There haven't been any primary elections since

the court's decision?

MR. BAILEY: That's correct.

But we submit t hat the payment of -- we think that what we've got here in this particular case is that there are several methods that a person can reach above the caucus. They can do it under a banner of a particular political party; they can run in a general election on a write-in -- I mean by getting on the ballot in the manner provided at the general election.

I think that the court below said that some right of the voter had been infringed upon here. Actually, what the court has said is that a voter has a right to vote for a particular candidate, and if the State, by its statutes in regulating the election process, does anything to keep a particular voter from voting for a particular candidate of his choice, if anything keeps him off the ballot, be it a filing fee, or some other problem of having to do something, keeps him off the ballot, then it is constitutionally bad.

We think that what has been done here is actually -- and the burden has not been put on the voter by this, by the law the way it is, it's been put there now because ultimately this statute being held invalid, that taxpayer who is also the voter is going to now have to pick up the tab for these elections rather than the candidate.

Thank you.

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

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:24 p.m., the case was submitted.)