In the

Supreme Court of the United States

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated.
Appellants,

vs.

NELSON ROCKEFELLER, GOVERNOR OF THE STATE OF NEW YORK, JOHN P. LOMENZO, SECRETARY OF STATE OF THE STATE OF NEW YORK, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the Board of Elections in the City of New York,
Appellees.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,
Appellants,

vs.

NELSON ROCKEFELLER, GOVERNOR OF THE STATE OF NEW YORK, JOHN P. LOMENZO, SECRETARY OF STATE OF THE STATE OF NEW YORK, WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, COMMISSIONERS OF ELECTIONS FOR NASSAU COUNTY,
Appellees.

No. 71-1371

Washington, D. C.
December 13, 1972

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Washington, D. C.

Wednesday, December 13, 1972.

The above-entitled matter came on for argument at 11:48 o'clock, a.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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BURT NEUBORNE, ESQ., New York Civil Liberties Union, 84 Fifth Avenue, New York, New York, 10011; for the Appellants.

A. SETH GREENWALD, ESQ., Assistant Attorney General of the State of New York, 80 Centre Street, New York, New York, 10013; for the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Rosario against Rockefeller, 71-1371.

Mr. Neuborne.

ORAL ARGUMENT OF BURT NEUBORNE, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This case involves the constitutionality of Section 186 of New York's Election Law, which imposes severe restrictions upon qualified voters seeking to join the political party of their choice and to participate in their party's primary elections in New York State.

The complex and often indirect operation of New York's deferred party enrollment scheme is set out at length in petitioner's brief at pages 4 through 7.

But, while the operation of New York's scheme may be complex and difficult to follow, its effect is very clear.

New York's scheme imposes two serious impediments upon the free operation of the electoral process in New York State.

First, it establishes a cutoff period for participation in a party primary which is longer than the cutoff period of any other State in the United States.

In order to qualify to participate in a presidential

primary in New York State, which in New York State are held in June of each -- every four years in June -- a potential party enrollee must enroll in October of the preceding year, fully eight months before the party primary.

In order to participate in a primary in a non-presidential year, which in New York State are held in September, a potential enrollee must enroll in the party in October, fully eleven months prior to the primary in question.

Thus, petitioners in the instant case who registered to vote for the first time in December of 1971, and who sought to enroll in the party of their choice for the first time in December of 1971, were barred from voting in the June 1972 primary because their enrollments had not become effective on or before October 2, 1971, fully eight months before the primary.

The second impact, which New York's statutory scheme has on the operation of the political process, is to impose a waiting period of a substantial period of time between the attempt of a voter to join the party of his choice and the effective date of his acceptance by the party.

Indeed, petitioners in this case, who attempted to join the Democratic Party for the first time in December of 1971 and who completed solemn declarations of party loyalty at that time, pledging to adhere to the principles of the party and to support the candidates of the party, generally, at the

next elections, will not be recognized by the State of New York as members of the Democratic Party until sometime between November 14, 1972, and February 1, 1973, a waiting period of between eleven to fourteen months.

Indeed, the drastic operation of New York's law can be understood if we apply it to a person in New York State who registers today for the first time.

If one of the two million unregistered voters in New York -- qualified, but unregistered, voters in New York City were today to seek to enroll and to seek to register in a New York City registration office, he would be ineligible to participate in the primaries for the Mayor of the City of New York scheduled to be held in September of 1973, and his application to become a member of the political party in question would not become effective under New York law until sometime between November 15, 1973, and February 1, 1974.

The existence of so drastic a curtailment of the political process poses very serious constitutional issues, but we should note at the outset that there are several issues which are not posed in this case.

There is not posed in this case any issue of internal party regulation, in that the statutes in question are imposed by New York State upon the political parties of New York whether or not they wish to have them applied.

Indeed, in the instant case, the Democratic Party,

the party into which the four petitioners sought entry in December of 1971, appeared in State Court in June of 1972, shortly before the primaries, and requested that petitioners similarly situated -- that plaintiffs similarly situated to the petitioners be permitted to participate in the Democratic primary.

That State Court proceeding was dismissed because of lack of time and has not been reinstituted.

But we should emphasize that there is no interest whatever in permitting the political parties in the State of New York to regulate themselves, raised by this case.

Nor does this case necessarily raise the arguably more difficult issue of party switching or the alteration of a pre-existing party affiliation.

For the four petitioners in this case are all new registrants, first time voters, who were seeking to do nothing more than to register their initial party affiliation.

Q Would the impact of your position have an effect on the parties and on the people who are already registered in one political party or the other?

MR. NEUBORNE: I think not, sir. I think it would simply permit those persons who wished to join a political party to do so.

Q Well, what about those who have already joined one and they want to vote in the primary of the other party?

Wouldn't the adoption of your position open that up?

MR. NEUBORNE: I understand, sir.

It would be possible for this Court to frame a decision narrowly to apply only to those persons who are seeking to register their initial party affiliation.

Q Is that all you are --

MR. NEUBORNE: No, sir, we are not. We believe that the application of the New York process even to persons who have been members of one political party and who seek to alter their party affiliations raise very serious constitutional questions.

And we believe that under the least drastic alternative analysis, which this Court has evolved, that even those regulations cannot stand, but I simply --

Q Is there something in the record to show in what category the named plaintiffs are?

MR. NEUBORNE: Oh, yes, sir. The allegations are that they are registering for the first time and that they had never before been members of any political party.

Now I do not believe that those facts are controverted or that any contention --

Q Well, it is clear then that they aren't in the class of people who have moved from one county to another or from one State to another?

MR. NEUBORNE: That is correct also, Your Honor.

Q Your narrower argument would be that the State's interest against rating, if it be illegitimate, can be adequately protected by dealing only with those who have been already registered?

MR. NEUBORNE: Precisely. But by dealing with the potential class from which, if raters are to come at all, they will come.

I suggest to the Court there is now pending before the Court Kusper v. Pontikes, an appeal from a three-judge court in the Illinois District Court, in which the issue of crossover participation, the issue of switching from the Republican Party to the Democratic Party, was discussed by the Court below. The statute was declared unconstitutional. And that case, I understand, is now pending on appeal before this Court now.

So that if this Court wished to address itself to the broader issue of crossovers, as well as initial party affiliation, it could do so in the Pontikes case.

The basic issue, as we see it, therefore, raised by this case, is whether New York may place such drastic obstacles in the path of persons seeking to register and record their initial party affiliation.

And we think the most obvious legal disability inherent in the New York scheme is that it obviously operates as a durational residence requirement.

Indeed, New York State, I do not understand to argue to the contrary.

It is conceded that any person who established a residence in New York on or after October 2, 1971, was ineligible to participate in the June 1972 primaries. And it is conceded that any person who established a residence in New York on or after October 14, 1972, is currently ineligible to participate in the September primaries scheduled for September 1973.

Instead of responding to the argument on the merits, New York has argued only that the petitioners, as persons who are long-time residents of New York, lack standing to raise the durational residence requirement issue.

But there seems no doubt that petitioners have suffered an injury, in fact, at the hands of the New York's deferred enrollment scheme.

There seems no doubt that they possess the classic adversarial posture concerning the continuation of New York's deferred enrollment scheme.

And this Court, in similar situations in the past, has permitted petitioners situated similarly to the petitioners in this case, to advance the arguments of persons who share a basic community of interest in dealing with the allegedly unconstitutional scheme before the Court.

Thus, in Pearse v. The Society of Sisters, Thornhill

v. Alabama, Barrows v. Jackson, Griswold v. Connecticut, Eisenstat v. Baird, and most recently in the Chief Justice's opinion for a unanimous Court in Bullock v. Carter, the Court permitted the petitioners before the Court to raise the arguments of persons with whom they were united in interest in seeking to deal with an allegedly unconstitutional scheme, especially when the continuation of the allegedly unconstitutional scheme would have an inhibitory effect upon the exercise of fundamental constitutional rights.

Moreover, the Rosario case was brought as a class action on behalf of all persons who were being impeded in attempting to join their political party by the operation of New York's deferred enrollment process.

Judge Whistler, in his opinion in the District Court, specifically noted it to be a class action, and, thus, we suggest that the petitioners herein have classic standing to assert the arguments of the members of their class, as to the unconstitutionality of Section 186.

Although the duration residence requirement, we suggest, is the most obvious violation of the Constitution before the Court, quite clearly, New York's statute operates on long-time residents as well to violate their right to vote and participate in the political process.

This Court in the past decade has forged a rigorous standard which must be applied to State statutes which restrict

the operation of the franchise.

The test, as most recently formulated by the Court in Dunn v. Blumstein, is whether the State statute at issue advances a compelling State interest by the least drastic means.

New York State argues first that because this is a primary election we are talking about, instead of a general election, that some lesser weakened diluted Constitutional standard should apply.

However, this Court has recognized for 30 years that the right to vote can be entirely frustrated unless it also includes the right to particpate in the nominating process.

Indeed, as the Chief Justice noted in Bullock v. Carter, often the outcome of a primary election is even more important than the outcome of the general election because quite often you have one party safe seats.

This is especially so in a State like New York where one party strongholds have existed from since the Civil War, and there were numerous primary elections.

(Whereupon, at 12:00 o'clock, noon, the Court recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Neuborne, you may continue.

MR. NEUBORNE: Thank you, sir.

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

When we adjourned for lunch, we had begun to discuss the argument made by New York State that because this is a primary election that we are dealing with here, instead of a general election, that some more relaxed constitutional standard may be utilized to judge State statutes restricting the interested parties from participating in such an election.

I had invited the Court's attention to a line of precedent which began 30 years ago in this Court and culminated in the Chief Justice's recent opinion, in Bullock v. Carter, in which he pointed out that the outcome of a primary election is often more important than the outcome of the general election itself, and that for precisely those reasons if the right to vote is to receive adequate protection it must also include the right to participate in the processes by which the candidates are chosen.

Indeed, that has been the law in New York State, pursuant to New York State law, since 1911.

Thus, whatever the constitutional standard is that is to be utilized in judging the constitutionality of State

statutes restrictive of the franchise, petitioners submit that the same standard must be utilized in judging statutes which restrict participation in primary elections.

The State argues, however, that even if one applies the compelling State interest test to the statutory scheme before the Court, New York is able to meet that test because the statutory scheme deters bad faith rating of a political party by persons not in sympathy with the party's principles who will attempt to participate in that party's primary election, to, in some way, injure the party.

However, even assuming that the State has a compelling interest in guarding against bad faith rating, and I suggest to the Court that a very real question exists as to whether the State possesses any compelling interest at all in prohibiting persons attempting to affiliate with a political party for the first time to affiliate with that party.

But, even assuming that the State does possess some compelling interest in the prevention of fraudulent participation in a primary, it is clear that at least five less drastic alternatives exist, by which New York State could advance its commendable interest in this case without at the same time causing the broad disenfranchisement of thousands of New York voters each year.

First, and most obviously, New York already has a very effective device to guard against bad faith rating.

Section 332 of New York's Election Law provides that a person enrolling in a political party may be summarily disenrolled at the instigation of a member of the party after a hearing before a party functionary, upon a finding that the attempted enrollee was not in good faith in his attempt to join the political party.

The operation of Section 332 in New York State has been one of extreme effectiveness. Indeed, the history of Section 332 in New York State demonstrates beyond argument that it has been an effective tool to deal with precisely the evil which New York State contends Section 186 is designed to deal.

Q That would be an awfully hard thing to prove.

MR. NEUBORNE: Your Honor, the proof that has been adduced in the various cases was to show a pattern of persons moving from one party into another party, filing virtually identical declaratory statements with a long history of having been engaged in a contrary political activity, and some evidence that they intended at some future time to go back to that party.

The hearings under Section 332 are reported in a number of New York cases, the most significant of which I suggest is Zuckman v. Donahue, where 900 persons who were allegedly raiding in a political party context were disenrolled after a judicial hearing demonstrating that they were attempting

to enroll in bad faith.

As Chief Judge Mishler pointed out in the District Court --

Q Before the damage is done?

MR. NEUBORNE: It is brought on exceptionally quickly, yes, sir.

The initial hearing is one held before the county committeemen of the party itself. Now, of course, that hearing must, in order to be constitutionally permissible, must be subject to judicial review, but it is subject to judicial review on a summary petition with very, very expeditious consideration, and has, in the past, in New York, worked admirably in dealing with precisely this problem.

Q How many cases have gone through judicial review?

MR. NEUBORNE: There are approximately 10 reported cases in New York State -- situations such as this.

Q Over what period of time?

MR. NEUBORNE: Well, we have had Section 186 on the books, in one form or another, since the end of the 19th Century.

The summary disenrollment procedure has been available to us for a substantially shorter period of time, but my recollection is, Your Honor, that the earliest case is approximately 1930, that is cited in the reports.

Most of the raiding, if that's what one can call it,

has gone on in New York, went on in the period when the American Labor Party disintegrated into two wings, the American Labor Party and the Liberal Party, and a contest commenced with what had been the constituency of the American Labor Party.

And it was in that context that most of the raiding situations came up.

Even in that context, a heated political struggle between two factions, 332 was utilized with great effectiveness in maintaining the purity of both political parties.

Q When did this statute before us come on the books?

MR. NEUBORNE: Section 186, Your Honor?

Q The one that we are now dealing with.

MR. NEUBORNE: The statutory scheme of having an enrollment box which is opened once a year, I have traced back to 1898.

It is in the codification of the Election Law in 1909 and it has been continued forward to the present time.

Chief Judge Mishler, in writing in the District Court, noted the effectiveness of Section 332 as a device to guard against party raiding, and I note in passing that Chief Judge Mishler spoke with a great deal of experience.

Before his elevation to the bench in 1961, he was the Chairman of the Queens County Republican Party, and had been its candidate for public office on a number of occasions, is familiar with the operation of the political process in New

York, and recognized Section 332 for what it is, a very effective device to guard against bad faith raiding.

A second less drastic alternative open to New York, would be to apply these restrictive affiliation rules only to those political parties who want them. In other words, if a party thinks that it is in some way being endangered it could -- I suppose New York could if it wished set up a statutory scheme that allowed a party some option in protecting itself.

New York has not chosen to do this, has chosen instead to impose these restrictive rules on parties whether or not they wish them and, indeed, in this particular case, the Democratic Party went to Court to say precisely that it didn't want them and, nevertheless, was forced to live with them.

The third less drastic --

Q Might not that pose some kind of serious administrative problems, though, to the registration officials if one party could be in and one party be out, as long as you do have a State registration system?

MR. NEUBORNE: I think not, sir. I think the first answer is that if that's what is necessary to permit persons to vote, the fact that it would be administratively more difficult to operate would not be a sufficient justification for not utilizing it.

But I do not believe that it would create substantial

administrative problems, because it would be perfectly possible -- we only have four parties in New York State, the Republican, the Democrat, Liberal and Conservative.

It would be perfectly feasible if the Legislature of the State of New York wished to permit those parties to opt for some form of deferred enrollment process, and simply have the registrars make the entries as to who is a party member at the point in time which the political party wished.

In other words, those parties which did not opt would have the entries made immediately. Those parties which did opt could, if they wished, have the material in the enrollment box for a period of time.

But the same number of entries would have to be made by the administrative officials. It would simply be making them over a longer period of time.

Indeed, it might, Your Honor, it might be administratively easier to do it this way, because the way the system works now, all party enrollments in a year must be entered by the official in a very short period of time.

As soon as the enrollment box is open in mid-November, every enrollment that has been made during the preceding year must be entered within a very short time, creating a very serious administrative backlog for the process.

Party option might have the effect of spreading it out over a longer period of time and making it administratively

more workable.

I do not suggest that I am in favor of party option. I merely pose it to the Court as a possible less drastic alternative which New York could have utilized.

A third less drastic alternative which we discussed earlier was the application of this particular statute to the class which even arguably, the only class which even arguably poses a danger of raiding, and that's those persons who have a pre-existing party affiliation, and who are seeking to alter that pre-existing party affiliation.

Every single instance of raiding which has been cited in the New York reports and which has been discussed by the Attorney General, has involved persons of a pre-existing party affiliation attempting to alter that affiliation to participate in the affairs of another party.

Indeed, no other State except New York has found it necessary to apply these types of restrictions to persons seeking to newly affiliate with a political party.

In Phoenix v. Kolodziejski, Mr. Justice White, writing for this Court, noted that it would not be permissible for a State to base electoral restrictions on a hypothetical possibility not reasonably likely to occur.

And in that case, he pointed out that only 14 other States had similar restrictions on the franchise.

Well, this case is even dramatically more

insubstantial, in that no other State has seen fit to impose this type of restriction upon persons attempting to affiliate with a political party for the first time.

Q You do have a fairly unique situation in New York with your four recognized parties.

MR. NEUBORNE: I don't claim to be an expert on the political party structure of the other 49 States, but I would be surprised if there were not minority parties in other States as well.

If Ohio, Illinois, California, Pennsylvania, can get along without this type of restriction applied to newly enrolled persons seeking to merely register their initial party affiliation, it is inconceivable to me that New York requires this type of drastic restriction which has the effect of barring persons similarly situated to the petitioners, from participating in a primary, despite the fact that they tried to enroll in that primary over six months before it was held.

The fourth less drastic alternative would be a reliance upon the loyalty oath, which New York State currently requires persons attempting to enroll in a political party to sign.

In order to enroll in a political party in New York, one must file a solemn declaration of adherence to party principles and a solemn declaration of intention to support the nominees of the party at the next general election.

That requirement forbids casual party affiliation in New York and it has the effect of making it virtually impossible for large casual party switches to occur.

In other words, we must assume, if there is to be an evil in New York State that persons will fraudulently execute these affiliation -- these enrollment blanks, and it is, we believe, inconceivable to think that large scale fraudulent switching will occur.

Finally, if large scale fraudulent switching does occur in violation of the party loyalty oath, New York maintains a comprehensive system of criminal sanctions for fraudulent participation in the electoral process, which, as Mr. Justice Marshall pointed out in Dunn v. Blumstein, can be used effectively to guard against fraud.

So that really what New York has done here is not use the least drastic alternative.

The only way to describe what they have done is they have used the most drastic possible alternative to deal with this problem, and they therefore in so doing have unnecessarily disenfranchised thousands and thousands of New Yorkers.

Even if this case did not involve voting rights, even if it did not involve a dilution of the franchise and a triggering of the compelling State interest test, it would nevertheless raise the most serious questions under the

association freedoms protected by the First Amendment, because the effect of New York statutory scheme is to create a waiting period which forces persons attempting to join a political party to wait as long as 14 months before they are accepted into that party.

Now the right to join and the right to associate with a political party for the advancement of common beliefs is the core association freedom protected by the First Amendment. It is the most important association freedom we have.

Now, before New York can impose this type of drastic and unique interference with the operation of that associational freedom, it must come forward and demonstrate some overriding societal interest, which can be advanced by no less drastic means.

That is precisely the test that Mr. Justice Harlan used in his concurring opinion in Williams v. Rhodes, when he analyzed the impact of the Ohio Election Law and ruled that it had an impermissible constitutional effect upon persons attempting to associate for the advancement of common political goals in Ohio.

We suggest that it is no coincidence that the test, the constitutional test, which Mr. Justice Harlan utilized in Williams v. Rhodes, is very similar in operation and effect to the compelling State interest test which Mr. Justice Marshall

utilized in Dunn v. Blumstein.

They work very, very similarly. They come out just about the same, and they do because they are both designed to protect the single most important values that we can possibly have in a democracy, which is the right to participate in the political process by which are leaders are chosen.

That is an ultimate First Amendment right, as well as a right to vote, and we suggest, therefore, that even if, as Mr. Harlan did in Williams v. Rhodes, even if one has chosen the Kramer, Evans v. Cornman, Dunn line of authority, and analyzes this case solely as an associational freedom test, the interests which New York State has advanced are far, far less compelling than those which this Court has rejected in associational freedom cases of the past.

If I may, Your Honor, I would like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Nueborne.

Mr. Greenwald.

ORAL ARGUMENT OF A. SETH GREENWALD, ESQ.,

ON BEHALF OF THE APPELLEES

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

In considering this case, I think that there is a certain similarity to the previous case argued here, to those of us acquainted with professional sports.

It seems to me the previous case concerned itself with what California can do to stop the Pirates and the present case involves what New York can do to stop the Raiders.

The statute in question, New York State Election Law, Section 186, the enrollment box statute, simply provides that enrollment blanks in a party are placed in a box and are removed after the general election.

What this means, as has been pointed out, is that for an enrollment to be effective for the primary next succeeding, it has to be done before the general election.

If it is done after the general election, it is deferred.

Q These problems are the same for first voters as for all others, people who are moving and people who just have never bothered to register over a lifetime?

MR. GREENWALD: New York has, in Section 186, a general rule that provides that registrations, excuse me, enrollments, must be accomplished before the general election to avoid the danger of raiding.

However, the next section of the law, Special Enrollments, provides that persons who have reached voting age after the general election can get a special enrollment and immediately enroll in a party up to 30 days before the primary.

There are a number of other exceptions provided in

Section 187.

Another one is if a person did not have residency requirements at the time of the preceding general election. However, once again, there is a further restriction there in subdivision 6 of 187, that is restricted to the same county as the person resided at the time of the preceding general election.

So, I think that New York has shown that it is not opposed, per se, to later enrollments. It is concerened with the danger of raiding and protecting party integrity.

Q In what category are these named plaintiffs?

MR. GREENWALD: These named plaintiffs are voters who were eligible and could have been effectively enrolled in a party before the preceding general election, but failed to do so for unstated reasons.

Q They never had been enrolled?

MR. GREENWALD: They never had been enrolled, that is correct.

And, the point is that the --

Q Raiders or potential raiders?

MR. GREENWALD: I think they can be, because New York is concerned with non-party votes being cast in a party primary for purposes inimicable to the party. And there is the same danger with the independent and you have to keep in mind that an independent is one of the major political blocks

of American political life.

An independent is material for a raid also, just as people who have actually enrolled in another political party.

I think that it is quite apparent that in many situations if a party is engaging in raiding it is not going to stop just with its own members' raid, it is also --

Q Let me see. I thought this was a group who, after the ratification of the amendment permitting 18 to 21 year olds to vote for the first time became eligible and that was after the general election.

MR. GREENWALD: No.

Q Aren't they a group who became 18 to 21 and eligible to vote following ratification of the amendment.

MR. GREENWALD: The 26th Amendment was ratified in the summer of 1971, I believe July. At that time, anyone who was enfranchised by the 26th Amendment was eligible to register and enroll in a political party in the State of New York.

If they failed to do so by, as would anyone else in the State of New York, if they failed to do so by the general election of '71, they were not enrolled in the party to vote in the 1972 primary.

Q But if they became 18 after the general election, they could specially --

MR. GREENWALD: Specially enroll under Section 187.

There is an exception.

Q But this group could not?

MR. GREENWALD: This group could not because it had not availed itself of the statutory obligation to enroll in the party --

Q You say that these named plaintiffs had -- were eligible to enroll prior to the general election?

MR. GREENWALD: That's stipulated. There is no argument that these named plaintiffs, petitioners involved here just simply failed to take the opportunity which is available to every voter in the State of New York to enroll in a political party timely and avoid the dangers of raiding.

Q Are the plaintiffs distressed at the time just being too long a time?

MR. GREENWALD: That is part of it, and I think the Court of Appeals opinion addresses itself to why we have the date of the general election as the operative date. It has to be done before the general election. That is simply that before the general election it would be the rare politician that would encourage a voter to vote for his party at the general election but enroll in another party.

But, after the general election, no such deterrent would be present. He doesn't have to put himself in that type of unseemly, incongruous position.

And I have indicated that we are seeking to

discourage raiding.

Q What was the date of the New York primary?

MR. GREENWALD: The New York primary was June 20, 1972, this year.

Q June 20th. And at that primary, were nominations for other offices than the Federal offices?

MR. GREENWALD: At that time, there were nominations for Federal offices, State offices, such as the Assembly and State Senate involved. Yes, there were State offices involved also.

Q Mr. Greenwald, I was a little bit confused by one of your earlier references to raiding. I have understood it as being the process by which people unsympathetic to the basic goals of a party try to take it over for a particular period of time.

I, perhaps erroneously, got the impression from one of your comments that you thought of raiding as something broader, as a party on its own initiative going out and getting independents to join it.

MR. GREENWALD: Well, to join it in -- Justice Rehnquist, to join it in a raid on another party.

I would also like to point out that in this day and age when we have a lot of well organized independent, ostensibly non-political, groups which at, perhaps, primary time have political interests, say, to defeat a candidate, they also would

encourage people to enroll in a party, independents, other party members to defeat a candidate who is adverse to the interests they care to advance.

And, I think, once again, that this is destructive of the political party process as we know it.

New York, of course, has a closed primary system.

Q Isn't there another problem of crossovers, say, by Democrats, into a Republican primary to influence the choice of the Republican nominee and then vote against him at the general election?

MR. GREENWALD: Precisely. It can work both ways.

Q It can work both ways all right.

MR. GREENWALD: It is not an issue of who has the advantage at one particular time. I think there is a clear compelling State interest in preventing this type of activity from occurring. And, certainly, Section 186 is an effective means of doing it.

Q Mr. Greenwald, basically raiding is done by one party going into the other party temporarily, is that right?

MR. GREENWALD: That is basically the generally accepted definition.

Q That is not true here.

MR. GREENWALD: Well, I contend that --

Q What is there in this record that shows that these people were ever in any other party?

MR. GREENWALD: They were not ever in any other party.

Q Well, how can they be changing party?

MR. GREENWALD: I say that when a person has failed to avail himself of the opportunity to timely enroll, when at the time of the preceding general election, he failed to indicate that he was, say, a democrat, when he had the opportunity to do so, that when he later seeks to, in effect, change his status --

Q Change what?

MR. GREENWALD: Change status. Political status, from independent to, say, democrat, that is as much a change of political affiliation as when someone is a Republican and seeks to change it to Democrat.

Q Is there anything to show that they were independent? Maybe they just weren't voting, period. All people who don't vote aren't independent.

MR. GREENWALD: The question of why people don't vote is, of course, a hotly contested matter. A lot of people feel that it is simply a matter of apathy.

Q Well, you are dealing with people's rights here. I think you have to show some basis in order to deny them that right. Your basis is that this law is to protect people from raiding another party, which is not this case, I submit.

MR. GREENWALD: Well, the dangers involved in party

raiding may not be immediately presented by this case, but I do submit that if Section 186 had not been in effect this past year, there would have been a substantial crossover vote in the State of New York.

This was demonstrated by the fact that in States where party affiliation restrictions had been struck down this spring, there was substantial crossover voting and non-party members voting in, say, the Democratic primary.

Q There was also crossover voting in New Zealand, I imagine, too, but we are restricted to these plaintiffs and the class they represent. Am I correct?

MR. GREENWALD: I understand the class that is involved.

Q Is there anything in the record that shows that shows anybody in this class was crossing?

MR. GREENWALD: No, there is nothing in the record to show that these particular petitioners were crossover voters.

Q The Constitution goes to the person involved.

MR. GREENWALD: Yes.

Q I suppose one of the State's contentions here is that given the nature of the evil it was entitled to adopt a prophylactic solution that struck generally at what was involved, and the fact that it might on occasion be a somewhat more attenuated nexus than others, wouldn't necessarily make it unconstitutional.

MR. GREENWALD: I think that that certainly is the case. We have here a statute that directs itself equally at an evil. It places the same requirements on all voters, generally.

Q In that primary in June, would there be any sort of vote which had a bearing on the selection of delegates to the National Convention?

MR. GREENWALD: You mean the one past June?

Well, at the time --

Q I mean was this a bunch of youngsters who it was thought if they could vote in the primary would probably vote for McGovern for the Democratic candidate?

MR. GREENWALD: Well, I think that when this case came up here on petition for certiorari, a political organization, Lawyers for McGovern, filed a brief amicus curiae.

It is interesting that today they didn't file a brief on the actual case.

Q It is academic now.

MR. GREENWALD: Well, it shows that -- it shows where their concern is at one particular primary, in the personality of one particular candidate, or perhaps one particular issue.

And I think that the argument that the petitioners made that a person has the right to join a party to advance the interest of a particular candidate or a particular issue,

strikes at the heart of our political party system, which contemplates that people join a political party because they are generally attuned to the basic theories of Government of the party.

Now, once again, I recognize that our political parties are fluid in the United States, and I think that's the beauty of the deferred enrollment system. A person who joins the Democratic Party in a national election year, such as this year, could effectively join, say, the Liberal Party for a municipal election which is coming up next year, and in the following year, join the Republican Party for the State election, if he feels the issues are different.

Now, I don't think there are too many people who do this, but the opportunity is available. All New York State asks is that the person do this at the proper time to avoid the danger of raiding, or short notice takeover of political parties.

Involved herein is the integrity of the closed party primary in the State of New York, which includes, not just Democratic and Republican parties, but rather the two other minor parties, the Conservative and Liberal parties, which have very limited enrollments; and especially when you get down to an assembly district basis, primaries in those two minor parties can be controlled by very few votes. It is very easy to take them over with members of other political

parties, or, for that matter, well organized independents with interests antithical to the political party.

Q The New York is the only State that has the period, defers the period from the date before the previous general election?

MR. GREENWALD: I have checked the statutes of other States. Kentucky has a similar system as to people who have affiliated with a party. You cannot switch your party enrollment between the period of the general election and the primary.

Also, from my reading of the Kentucky statute, I would say this would include anyone who registered to vote but failed to enroll in the party. However, there is a provision, as I said, for new registrants.

I do think though that most States, or a goodly number of States,are trying to accomplish the same thing as the State of New York is trying to accomplish here, to reduce the possibility of party raiding.

And the fact that Section 186 is an effective means of doing it, as the Court of Appeals below pointed out, does not mean that it is an improper means.

I think this brings us to the issue of just what is the nature of a primary. A primary is not a general election. It is set up to allow party members to select their candidates, and, as such, it replaces a caucus or convention.

The vote is properly limited to party members.

If you don't close your primary -- and some States don't close them -- you have the possibility, indeed, the probability of raids.

I think this is demonstrated that it has always been the case in States such as Wisconsin. What happened this spring is instructive.

I would submit that a State has the discretion to define the constituency of a political party so long as the definition does not permanently exclude anyone who may wish to be represented.

That's exactly what is done here. The enrollment is taken but it is deferred.

Now, we have, at this point -- I have contended that I do not think it is necessary to apply the compelling State interest test. I would contend that the traditional, rational basis test is perfectly applicable to this type of control of the exercise of the franchise. This is not a disenfranchising statute, and I think the fact it applies to all voters equally in primary voting is indicative that you can apply the rational basis test.

However, and I am well aware that this case has always been decided on the basis of the compelling State interest test, we have another standard, and I think it is called, perhaps the close scrutiny because allegedly fundamental

rights are involved.

Once again, this statute has withstood close scrutiny, and the statute has an important purpose, and especially because it is a primary case --

Q Has it been on the books --

MR. GREENWALD: Oh, yes. It has been on, I think you can say a little longer than Mr. Neuborne has, but the basic point is that since the beginning of the primary system in New York, we have had this deferred enrollment system.

I think that's instructive,if you know, probably some of you do, some of the political history of the State of New York has been filled with a lot of political shenanigans, and back room tactics, and I think that the desire of the State of New York to preserve party integrity to avoid unseemly electoral practices is perfectly proper.

However, if we have to meet the compelling State interest test, I think, we have to go no further than look at the Court of Appeals opinion.

I don't think there is too much dispute at this point that there is a compelling State interest in preserving party integrity and avoiding raids.

As such, the statute achieves its end by the least drastic means.

I object to this test because, as the Chief Justice has said, in very short past, that this statute -- that this

test demands perfection.

And yet 186 has met this test. It meets it because the suggested alternatives are not truly viable when you consider the dangers of large scale raiding.

The discussion of the party disenrollment statute, Section 332, demonstrates, as in the decision of the Court below, that it is enormously time-consuming and it would be ineffective in States with large scale raiding. The point being, of course, in the paucity of cases, that with 186 you don't have too many 332 cases.

The fact is that 332 is simply a supplement to Section 186, and there is no doubt in my mind that if we had to rely solely on 332 we would have a much more serious infringement to First Amendment rights with the Courts inquiring into voters' political beliefs and the genuineness of those beliefs which is avoided in Section 186.

As to this infringement -- alleged infringement of First Amendment rights -- it should be noted, as the Court said below, that 186 is designed to minimally infringe on First Amendment rights. A person has the right to enroll in a party. These petitioners have the right to enroll in a party. You can change your party and never lose a primary vote which is a distinction from a number of other post-primary restrictions that were struck down.

Q After the general election, could any one of these

have enrolled? After the '71 general election?

MR. GREENWALD: No. That's exactly what happened in this case.

Q Who may?

MR. GREENWALD: Who may? Yes. Section 187 of New York's Election Law provides a number of categories.

If I could, it states this subdivision 2 --

Q Where do you find that?

MR. GREENWALD: Right after Section 186. I don't believe it is in the appendix, but it is referred to in the Court of Appeals -- some of the exceptions of 187 are referred to in the Court of Appeals decision.

One of the exceptions is that -- as I have alluded to before -- a person who became of age after the preceding general election.

A person who became naturalized.

A person who didn't have the necessary residential qualifications, although, once again, I direct, if you had the statute, there is a further exception in Subdivision 6 which limits that to the same county.

A person who was in the service of the military at the time of the preceding general election or enrollment time.

A person who was in a Veterans Bureau Hospital, and also spouses or children.

A person who was incapacitated by illness during the

preceding general election.

These are all people who --

Q How does one go about if he is -- falls into one of those classes, what does he do?

MR. GREENWALD: Well, he goes to the Board of Elections within -- at least 30 days before the primary, and he gets a special enrollment and he is immediately enrolled in the political party and can vote in the primary.

I think that it is instructive, when you talk about First Amendment rights, that if a four-year restriction on a person who voted in the primary of another party from being a candidate of the second party is not an unjust infringement of First Amendment rights as was affirmed by this Court in Lippitt v. Cippollone.

Then it seems clear to me that the much lower restriction, or whatever, or requirements of Section 186, are not any more offensive to the First Amendment. They are amply justified by the situation involved.

Q That Ohio statute barred them from being a candidate if he had voted a primary of the opposite party any time within the previous four years.

MR. GREENWALD: Yes. And what I point out that I think it has been said by the Chief Justice in Bullock v. Carter, that the rights of voters and candidates don't lend themselves to neat separation.

It would seem to me that the right to be a candidate is as much a First Amendment right as the right to vote. They are both encompassed in the political rights of citizens.

I think also it is instructive that New York has a history of allowing party switches. 186 is not a serious bar.

If we look back to 1971, the situation with Mayor John Lindsay, who changed from the Republican to Democratic Party and then proceeded to seek the Democratic nomination.

If we look then also during a period when Section 186 would defer his enrollment. Congressman Ogden Reid switched from the Republican to Democratic Party. These switches are made in good faith and, as has been shown, Section 186 is not a bar to such switches of political affiliation.

Q Two voters in New York switched parties and that has what effect on me?

MR. GREENWALD: I am giving this example to demonstrate that Section 186 does not prevent the honest, trustworthy citizen from exercising his First Amendment rights.

Q Did you say those that acquire citizenship, in the meantime, can be registered?

MR. GREENWALD: Yes, I believe --

Q Well, in the Southern District, they sometimes have

three or four hundred in one class, am I right?

MR. GREENWALD: I am not acquainted. I will accept that.

Q Well, suppose you take all those over and register them in one party? Would that be raiding?

MR. GREENWALD: The State of New York, in Section 187, has made certain exceptions. They feel that these people who have not had an opportunity, certainly they couldn't have enrolled at the time of the preceding general election, they should have an opportunity to specially enroll.

Q Would it be raiding, was my question?

MR. GREENWALD: I don't say that is raiding. It might possibly be, but it is not a serious danger.

Q There is nothing you could do about that, could you?

MR. GREENWALD: Well --

Q Assuming it was raiding. Is there anything New York could do to stop it?

MR. GREENWALD: Yes. As the supplement of this enrollment statute 332 could be applied if that could be shown to be raiding. Section 332 of the Election Law, the disenrollment statute, Your Honor.

Q They could be disenrolled? For going in a block to register?

MR. GREENWALD: If it could be shown that it was raiding. I doubt if in such a situation it could conceivably

be raiding, if a person has just been naturalized.

Q What in your statutes defines what's raiding?

MR. GREENWALD: Raiding is not defined in the statute, Your Honor.

Q So you couldn't do anything to them, could you?

MR. GREENWALD: I doubt if anything effectively could be done.

The final thing I'd like to allude to is the injection of the durational residency requirement -- durational residency question into this case. I do not think it is present. There is no doubt that the instant petitioners, the people involved here never lacked residency.

Certainly, as to them, they are not being subjected to a durational residency requirement.

Furthermore, if there was such a petitioner in this case, a person who had moved into county or from out of State, there is no doubt in my mind that there is another section of the law that they'd be attacking, namely 187, Subdivision 6.

To that extent, it seems to me, the interest of that class, and my adversary has pointed out to the various classes possibly involved, although we only have one class in this case -- as to that class, the interest of the class the petitioners represent, are antagonistic. It is a different case.

It seems that the statute clearly is not a durational

residency requirement, does not, by its very terms, require someone be a resident of the State for a certain period of time before he can enroll in a party.

I think that it is essentially not in the case.

In summary, I think it can fairly be stated that Section 186 is a reasonable statute fulfilling a compelling State interest by the least drastic effective means.

It is submitted that it has a minimal effect on First Amendment rights and it is not a durational residency requirement or, there is another argument, a grandfather clause. There is no racial motivation in this case. It is not a grandfather clause. It is the young voters. Indeed, we do have an exception for young voters who come of age.

It was not in the complaint that any allegations of racial discrimination, and I think the decision in the welfare case, Jefferson v. Hackney, a very recent decision of this Court, clearly demonstrates that the possible greater effect on a racial minority is no proof of the fact that it is a racially discriminatory law.

Furthermore, there is nothing in the record to show that.

At this point, I will rest.

Q Was this question here before?

MR. GREENWALD: Was this question here before?

I had made an argument that there were appeals from

the New York State Court of Appeals, which did involve Section 186, and the deferring of enrollments that were appealed to this Court --

Q Did it raise the same question?

MR. GREENWALD: I contend that it did raise the same question. There was also the case of the Georgia voter --

Q I don't want that one. I want Friedman.

MR. GREENWALD: Friedman -- who is one of the co-counsel in this case, as a matter of fact -- Friedman appeared --

Q What was the issue in the case?

MR. GREENWALD: The issue was that Mr. Friedman could not be a candidate for Congress because his enrollment was deferred due to a late transfer of enrollment.

Q So you say it raises the same issue of the constitutionality of the section?

MR. GREENWALD: Yes, I believe it did and this Court dismissed for lack of substantial Federal question.

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

Mr. Neuborne, you have three minutes.

REBUTTAL ARGUMENT OF BURT NEUBORNE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. NEUBORNE: The Friedman case, Your Honor, was here prior to this case.

However, two distinguishing characteristics existed in the Friedman case.

First, Friedman was attempting to be a candidate, similar to the Lippitt situation where the candidate in Lippitt was attempting to run and not vote.

As the Chief Justice noted in Bullock v. Carter, the right to become a candidate may be very different than the right to actually vote in a particular election.

Secondly, --

Q Barred as a candidate by virtue of a provision dealing with candidates or was he barred as a candidate by virtue of this provision dealing with registration as a voter?

MR. NEUBORNE: I know of no provision that deals only with candidates, so I assume --

Q It would have been this provision.

MR. NEUBORNE: Secondly, and more importantly, Your Honor, I suggest --

Q The fact that it did deal with application of 186.

Q Treated him as not properly enrolled, did it?

MR. NEUBORNE: Yes, sir, to a person who wished to become a candidate.

Q How do you differ?

MR.NEUBORNE: Well, the major distinction that I have with that case is that the record in that case indicated that there was a very substantial question as to the good faith

of Mr.Friedman's residence, and, in fact, there was an adequate State ground upon which the State Courts passed on that case, and that's that there were serious questions as to whether or not he was a bonafide resident of the address from which he was attempting to enroll.

Q That's one of substantial Federal question. That's a different thing from dismissing because the State decision rested on inadequate State ground, isn't it?

MR. NEUBORNE: Yes, sir, I understand that.

Q So we can't treat it as having been handled here, on the ground that it rested on inadequate State ground, can we?

MR. NEUBORNE: There were serious statements --

Q We certainly didn't, when we dismissed it for want of substantial questions.

MR.NEUBORNE: That is correct, sir. However, I wish to reiterate that that was again a candidate case, very much as Lippitt was a candidate case.

More importantly, I think, Your Honor --

Q He was barred as a candidate because he was barred as a voter, wasn't he?

MR. NEUBORNE: Yes, sir, but his right to become a candidate triggered the particular test that the Court was utilizing at that time.

As Your Honor pointed out in Bullock, a very different

set of considerations come into play when a person --

Q It may be if you couldn't bar a voter a fortiori, you shouldn't be able to bar a candidate.

MR. NEUBORNE: Well, I am frankly troubled by that distinction, Your Honor.

Q Yes, I should think you would be.

MR. NEUBORNE: I am troubled by the distinction in Lippitt, and it is a distinction which has been made by this Court and which does distinguish the Friedman case.

Briefly, I wish to point out that the petitioners in this case could have registered during the brief period between the time the 26th Amendment was enacted, was ratified in June of 1971, and the close of registration in New York in October of 1971.

But they would have been registering in connection with elections in New York State where the highest office at stake was that of County Executive and where the turnout was exceptionally low, simply because there were no significant issues presented to the electorate at that time.

Indeed, the turnout was so low that the vast bulk of persons who registered under the 26th Amendment did so after the 1971 general election.

Q But then they are in the position of raising the constitutional question deriving from their own inadvertence or --

MR. NEUBORNE: No, sir, I don't think it is inadvertence.

Judge Dooley --

Q Well, then, their own indifference. I was going to use the word less than indifference. They were indifferent to that particular election, on what you tell us.

MR. NEUBORNE: Well, Your Honor, where the highest office at stake was that of County Executive, in the particular primary where they sought to enroll, they were attempting to participate in a presidential primary in New York.

Judge Dooley, in a related case, noted that you can swim 365 days a year, but you only do it when it is hot. You can register quite often, but you only do it when the political season begins to heat up.

And I submit to you, that these petitioners attempted to register to vote --

Q You only raid when it is hot --

MR. NEUBORNE: Well, that may be so, Your Honor, yes.

But, again, you only raid, I submit, if you are moving from one party to another.

Q Well, I suppose the fact is anyway any organized effort to organize the new 18 to 21 year votes did not get under way until after the general election in 1971.

MR. NEUBORNE: No question about it, sir. It would have been virtually impossible for large numbers of people --

Q As I remember it, you didn't come here -- I have forgotten whether it was you, or not -- on the stay until just a few days before the primary, wasn't it?

MR. NEUBORNE: Well, Your Honor, we moved as expeditiously as possible. The case was decided. The case was filed immediately after they were denied their enrollment.

It was decided by Judge Mishler within three weeks. It then went up on an expedited appeal to the Court of Appeals, where it was argued on February 24th. It was decided by the Court of Appeals on April 24th. We lodged the certiorari petition that same day with this Court and moved for a stay. The stay was temporarily granted by Mr. Justice Marshall on the 26th.

So that, I think the petitioners moved as, absolutely, as expeditiously as they could.

Q That's usually the way with these elections cases.

MR. NEUBORNE: Yes, sir.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:52 o'clock, p.m., the oral arguments in the above-entitled case were concluded.)