In the

Supreme Court of the United States

EDMUND G. BROWN, JR.,
SECRETARY OF STATE OF CALIFORNIA,

Appellant,

v.

RAYMOND G. CHOTE.

No. 71-1583

Washington, D. C.
February 22, 1973

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Washington, D. C.

Thursday, February 22, 1973

The above-entitled matter came on for argument at 10:36 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:

HENRY G. ULLERICH, ESQ., Deputy Attorney General of California, 600 State Building, Los Angeles, California 90012
For the Appellant

PHILIP ELMAN, ESQ., 1320 Nineteenth Street, N.W., Washington, D.C. (appointed by this Court)
For the Appellee

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 71-1583.

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

ORAL ARGUMENT OF HENRY G. ULLERICH, ESQ.,

ON BEHALF OF THE APPELLANT

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

The constitutionality of the California Candidate Filing Fee System is the subject of this direct appeal on the judgment of a three-judge Federal District Court granting a preliminary injunction against the California Secretary of State and the various county clerks in the State of California. The injunction, in effect, mandated the California Secretary of State to accept declarations of candidacy in the last primary election without payment of the statutory candidate filing fee of one percent of the annual salary of the office sought, as least as to those members of the class of the plaintiff below who were willing to file and affidavit with the county clerk that they had insufficient money or property to personally pay the candidate filing fee.

The issues presented by this appeal from the judgment granting a preliminary injunction is, does California's Election Code Section 6552, which imposes the statutory filing

fee violate the Equal Protection Clause of the United States Constitution?

Subsidiary issues are what is the appropriate standard of review when this statute is challenged in a judicial proceeding? The additional issue is whether this case is controlled by the decision last term in Bullock versus Carter 405 U.S. 134.

And a final issue is, if a less stringent standard of review is applicable herein other than the standard imposed in the Bullock case, does the California Candidate Filing Fee have a rational basis which would be sustained under the traditional rational basis test under the Equal Protection Clause?

Factually, California requires a party primary election in even numbered years preceding the general election. For the name of a candidate to appear on the primary ballot in June of even-numbered years, the candidate must obtain declaration of candidacy forms from the county clerk and at that time he is required to pay a candidate filing fee.

There is no method for a candidate's name to appear on the primary ballot without paying the candidate filing fee. Basically for state or federal office, that fee is either one or two percent of the annual salary of the office.

Q In that respect, why is it a percentage? Why isn't it a flat fee? Doesn't it cost the state as much to process something for the dogcatcher as it does for the United States Senate?

MR. ULLERICH: The answer to that, I believe, your Honor, is that the -- a particular flat fee over the years with the inflation that we have would tend to be perhaps minimal at one period of time and can become rather excessive in other periods of inflation or depression periods.

I think the annual salary, I mean the basis of the annual salary is pegged in more to the actual benefits at the end of the rainbow, if you will, and as the salary changes, the fee also changes somewhat. I think also there is a consideration that rather than being pegged at a very minimal fee of, say, as was suggested in one case of $10 or $15 to handle the actual cost of handling the papers would not achieve the state objective that these candidate filing fees are designed to achieve. That is, to avoid overcrowding of the ballots, fragmentation of votes or discouraging frivolous candidates.

The fee must be something more than a merely nominal fee to accomplish that purpose.

Q But you are charging candidate A more than candidate B if they are not running for the same office.

MR. ULLERICH: That is true, your Honor. As you'll

see from our statute, sir, quoted in our brief, the fees would vary from no fee at all if there is really no compensation for the office to one or two percent and the distinction for the one or two percent that seems to be apparent in the statute is that if it is a statewide office, for instance the United States Senate or a governor or lieutenant governor and so forth, there would be some activity on the part of 58 county clerks or county registrars of voters in regard to that particular candidate whereas if you are running from a particular district such as a member of Congress or state assembly or state Senator, there is usually only one particular county or a limited district that would be involved in processing those papers.

Q Well, then, also, if I understand your argument, you first quote the language in Bullock, recognizing that the state has a legitimate interest in regulating the number of candidates on the ballot and preventing clogging of its election machinery by frivolous candidates and your argument is that a $10 or $15 fee wouldn't keep a candidate for senator or governor, a wholly frivolous, nonserious one off the ballot. You'd need a higher figure to accomplish the state's purpose whereas a $10 or $15 fee probably would keep off a frivolous candidate for dogcatcher. Is that right?

MR. ULLERICH: That would be true, your Honor, and I think we have, where we are not writing on a clean slate

any more following that language in Bullock, as we pointed out in our brief, down in New Mexico, the Federal District Court invalidated the six percent of the annual salary filing fee for candidates for the United States Senate.

Following that Federal District Court ruling there were 40 candidates who filed for the United States Senate and appeared on that ballot, only four of which paid the candidate filing fee.

We haven't had a real experience in California because the decision below was rendered on March 9th, 1972. March 10th was the cut-off date for candidates to get their declarations of candidacy and their sponsor certificates into the county clerk. So with the limited publicity and the limited time, we haven't had the full experience. But if we can extrapolate a little bit from New Mexico to, say, the City of Los Angeles, if one candidate for every 50,000 people were to appear on the ballot, we would have like 50 candidates running for mayor of the City of Los Angeles and, certainly, there has to be something, some gauge to make sure that candidates have a modicum of support and a sufficient backing to really be termed a serious candidate.

Q Why?

MR. ULLERICH: -- and one --

Q Why? Why can't an individual citizen of this state that has no more support than himself have a right to

run?

For any office?

MR. ULLERICH: Well, I -- I think the reasons we have to give for that, really, the history of the candidate filing fee, your Honor, is that, part of it, these candidate filing fees came in to avoid this overcrowding. Really, the theory was to give people a more rational choice by limiting their choice somewhat. If you have too many candidates, you really couldn't understand all of the issues and the candidate and you couldn't really make a rational decision.

And, secondly, we have certain limitations, like in California --

Q Well, then you could have a selective one and only have two. Then you could understand them real well.

MR. ULLERICH: Well, what I am saying also is in 58 counties in California --

Q Then why do you have it on the -- is this gross or after income tax?

MR. ULLERICH: Well, this is on the gross.

Q The gross, yes.

MR. ULLERICH: For instance, for a member of Congress with 42,500, he would be $425 and --

Q Do you think that no man who doesn't have $400 has the right to run?

MR. ULLERICH: Well, I'm saying, really, that the

personal wealth or lack of wealth of the individual candidate is really not the critical issue, that we all know that campaigns cost a lot of money. That may or may not be a good thing, but campaigns cost a lot of money. I think in the last election, the newspapers were talking about $400 million for contributions to candidates and what I am saying is that a candidate, say, spends $50,000 or $100,000 to run to be a member in Congress and if you have sufficient support in your community or your interest group to be a serious candidate for that position, there is nothing in the law to say that the $425 can't come from contributions of your supporters, is that really that that is a fee that is just substantial enough to really make sure that you are going to make a serious run for this office.

Q And then you say to the poor man, I guess, the usual language in this day and age and he has no chance of running.

MR. ULLERICH: No, I'm saying that a poor man has a good chance of running. If he goes out -- we have -- we have something different --

Q If a poor man without a rich friend runs.

MR. ULLERICH: A poor man without a rich friend? He would have --

Q A dead digit.

MR. ULLERICH: -- he would have to run -- in the

spring of 1974, for instance, he knows what our statutory fee is and has been for a good many years. He knows a long way in advance as to how much money he is going to have to gather from contributions from friends, relatives and supporters to really conduct a serious campaign and one facet of that that he is going to have to consider is he is at least going to have to raise the filing fee before his name is going to appear on the ballot.

Q Is it your brief or one of the Amicus briefs that makes the point that if a man is a serious candidate he should have no trouble in finding 425 people who could contribute a dollar each.

MR. ULLERICH: We used that as an example, yes, your Honor. We are saying that -- it was part of our point that the personal wealth or the lack of property of the individual should really not be that significant. If he is meeting in his locality, if he is gearing up to run for the office, he really can go around and collect a dollar or two from his supporters and if he is really a serious candidate, that should not be an insurmountable burden to keep him off the ballot.

Q Well, I take it if he can't raise $425 and plans to run for Congress, his candidacy is pretty well foredoomed regardless of whether there is a filing fee or not. If he can't raise some money to conduct a campaign,

he isn't a serious candidate even though there were no filing fee.

MR. ULLERICH: Yes, your Honor, we agree with that, this is merely a threshold requirement really to test his seriousness as to whether he is of sufficient backing in the community to take a place on the ballot and we have to consider also the various types of machine. We don't have one standard type of machine in California. Some counties have voting machines and some counties have votomatic-type notebooks that open up and I think the number of candidates and issues (that) appear on the ballot is a serious consideration nowadays.

You may have seen that when we had the primary in California in 1972, due to the length of time it was taking people to vote in San Francisco, the polls there remained open an additional three hours to allow people to vote. I think that this sort of conduct --

Q You couldn't chang e the length of the ballot?

MR. ULLERICH: That was one of the considerations, yes, the length of --

Q You didn't gove a damn, did you?

MR. ULLERICH: Well, as I said, the decision in this case was on March 9th, 1972 and there was only a period of 24 hours for people to learn about the decision. The members of the class represented by Appellee and go out and

obtain the papers from the county clerk, go out and get the required numbers of signatures from their supporters and get back in to the county clerks so we really haven't had a real live experience.

Q On your question of, if a man can't get enough support, I might very well be willing to vote for you for office, yet not be willing to give you a single nickel.

Right?

MR. ULLERICH: That's true, your Honor.

Q I might think you are the greatest man in the world, but, I mean, I don't have any money to hand around.

What you really mean is, the man has to show that he has financial support, not political support.

Am I right?

MR. ULLERICH: I would be inclined to agree with that and I also would add that the way that our election system has been operating for a substantial period of time, you really can't separate the two to determine a serious candidate.

Perhaps if we had some other method of campaign financing, we wouldn't have that problem, but the way that we are set up at the present time, money and serious candidacy appear to go hand in hand.

Q Mr. Ullerich, where do the funds that are collected through these fees go in California?

MR. ULLERICH: In California there is a division between the counties and the state for what we term state or federal offices. That is, the governor, the lieutenant governor or the state assembly, the state senate, members in Congress, these fees are actually collected by the county clerks who are the ones who pass out the papers to the aspiring candidate and those fees are then transmitted to the California Secretary of State and they go into the state treasury, basically.

For local candidates, candidates within a particular county, the county supervisor, the district attorney, the superior court judges --

Q So they go into the general revenues.

MR. ULLERICH: They would go into the general county revenues and both the state and the county, to carry that through, would have some substantial election expense, probably the counties have more than the states because they hire the election officers out at the precincts and print the --

Q Well, now, there is an intimation in the ACLU Amicus brief that never has there been an appropriation of the fees made for the election commission. Is this correct or not?

MR. ULLERICH: Well, this is hard to be specific, your Honor, by pointing to a particular state budget for this reason. As the funds collected by the Secretary of State

for candidate filing fees are delivered from his office into the general fund, this commission that is referred to is comprised of the Secretary of State, who is really our state election official, the Attorney General and one other officer and each of these three departments are funded by a preparation from the general fund so you can't earmark a particular -- follow the candidate filing fee system into the general treasury and out of the general treasury, but in a sense, they go into the general fund and and funds come out of the general fund to finance the operations of these particular departments, so we can't say X number of dollars has been appropriated for that commission, no, your Honor.

Q Did you take the same position in the District Court as you did here? As you are doing here?

MR. ULLERICH: In the District Court, your Honor, the matter moved very rapidly. The case -- well, the final date for filing the declarations of candidacy was March the 10th 1972. The complaint below was filed on March 3rd, one week before, with a return to the owner to show cause on March the 8th. Our office filed, in effect, a legal argument that the contention -- that the claim forward to state a claim upon which relief could be granted and we cited legal authority and also pointed out the matter of the budget of the Secretary of State but it was basically a legal argument --

Q So the District Court was part right when it

said, "Since no showing has been made by the state concerning either the necessity, the purpose, or the reasonableness of the filing fee statutes in question, we conclude that they are invalid."

MR. ULLERICH: Well, I can't agree to what showing would be necessary. I think that this argument would --

Q Well, I'm just asking. I'm just interested. You didn't even make the argument or the showing that you are now presenting here in this court.

MR. ULLERICH: No, we made that argument. We filed, in the original record you will see we had Superior Court cases in the state and the state --

Q So you made the argument that this was necessary to keep nonserious candidates off the ballot?

MR. ULLERICH: That is correct, your Honor and we cited various cases around the country --

Q Well, then, what is the source of this statement, then, that you made no showing? Is it that there wasn't evidence introduced or something?

MR. ULLERICH: That is the only thing that I can think. There was no evidentiary testimony taken in the brief District Court proceedings as to perhaps experience. The only thing I could think of would be experience that we have had in cases where we didn't have the candidate filing fees or statements of politicians as to what it takes to be a

serious candidate. There is no such evidence presented, but that was basically the same legal argument presented that we were making here.

Q All right, that's what I wanted to know. That was what I wanted to know.

Q Now, what/Mr. Ullrich, rather fundamentally in this case causes me concern, it is argued, as I understand it, in both briefs and basically in your oral argument here, as though the whole filing fee scheme had been struck down as violative of the Equal Protection Clause and yet I understand that all that the Court held was that an indigent, an indigent or at least a functional indigent, a person who could not afford personally to pay these fees, could not be required to pay them. Isn't that the extent of the holding of the Court?

MR. ULLRICH: That was the extent of their injunction, yes.

Q Well, that is all, then, we are dealing with, isn't it?

MR. ULLRICH: That --

Q In other words, analogizing it to Griffin against Illinois, it is not a case where the whole filing fee or requirement of a transcript to be paid for is struck down, but just that it cannot be constitutionally applied to a person who is absolutely indigent, or at least so absolutely

that he can't afford to pay these rather small fees. Isn't that what is in this Court?

MR. ULLERICH: That was the precise wording of the injunction.

Q Well, then, that is all we are dealing with, isn't it?

MR. ULLERICH: Well, I'm not so sure we are limited to that because it seems to me if the statute is unconstitutional as the Court predicated its decision, there is a good argument that it should be unconstitutional as to all cases submitted --

Q Maybe that would be a good argument in some other case, but in this case, isn't that all this Court held? It is like Boddie against Connecticut didn't strike down filing fees for people who want to get divorces, but it just said it could not be assessed against somebody who was absolutely unable to pay them and filed an affidavit to that effect.

MR. ULLERICH: That was the precise holding of the Court below.

Q Well, it is argued here as though the holding was something quite different, I think.

MR. ULLERICH: But, no -- that was the precise holding. Well, what we are arguing about and the reason why were perhaps broadened it is that we are concerned with this

distinction, really, that the Court is making between an indigent gaining a place on the ballot through this means devised by the Court as opposed to a hard-working employed man who perhaps really has political ambitions and skill and ability but because he has put aside a minimal amount of money to send his children to college or to care for the necessities of life and he wants to run for office, he is going to have to pay this $425 filing fee --

Q Well, that goes through American society, hospitalization and everything else, but am I wrong in thinking that the precise holding of this Court in this case was not that the filing fees violate the Equal Protection Clause but simply that it would violate the Equal Protection Clause to require an indigent to pay them?

Am I mistaken in this?

MR. ULLERICH: I guess the terminology that the Court would use, the Court would declare the statute unconstitutional as applied to --

Q If somebody filed an affidavit that he could not pay them?

MR. ULLERICH: That he did not personally have the money or property to pay the candidate filing fee.

Q Right. Right.

Q Even that is so limited, that doesn't meet the problem that you raise that there might be 66 candidates for

Congress on the ballot. That doesn't meet that problem, does it?

MR. ULLERICH: It certainly does not. Let me give another example as to where the decision below leaves us. Shortly after that decision hit the newspaper, we had a letter from a government teacher in high school who was very upset that all of his 18-year-old students could not file for county supervisor because they were very glad to file the pauper's affidavit that they did not have sufficient money or property and he thought it would be very good experience for them to run for that office.

So I mean, this merely illustrates as to where this decision leads us as far as recording the ballots or where frivolous candidacy is concerned. The --

Q Attorney General, does California use for any office the system that is prevalent in many states of requiring petitions signed by a specified percentage of the vote in the last election?

MR. ULLERICH: California does not at this time have such a system. The -- some of the lower or the Federal District Court decisions have intimated that such an alternative would be desirable. I -- I question as to whether that is a surefire alternative means to the problems that we express. It may involve money to get a lengthy nominating petition either to go out and hire somebody to gather the

signatures -- we have this problem quite frequently in California with our statewide initiatives. You may have to get someone to go out and stand in a shopping center to collect these signatures and they might want some nominal money to do that.

Q I see.

?

MR. ULLERICH: Assuming you have a lengthy -- there may be some charge by the county clerks who will then have to check those signatures to see if they are qualified signatures. For instance, registered voters, to determine just who was sagning these petitions. There is some case law, for instance, in New Mexico, the New Mexico Supreme Court pointed out that they had tried this and it really wasn't very effective because people have an inclination to sign anything whether they really know the person and know whether he is a bonafide candidate or not. That also, again, I think is an element of discrimination against the person who, for instance, is employed and doesn't have the time to go out and get the signatures that the unemployed or the indigent person might have and, of course, it will again open up the argument that requiring a lengthy nominating petition of, say, 3,000 signatures might be a more onerous requirement that somebody who is more affluent would be able to simply write out a check, so I am not sure that that is a final solution.

I think it is something, certainly, more legislators,

including the State of California could seriously consider but I don't feel it is a matter of constitutional mandate that every alternative has to be tried in cases such as this.

We didn't dwell on this point too much in the briefs, but the Bullock case decided last term concluded in that case that because of the Texas candidate filing fee system which basically was a fee which prospective candidates couldn't know in advance, it was a fee determined by the county political committee as an assessed cost of the total cost of the primary election. There is some suggestion in that case that the strict standard of review may not apply in those jurisdictions which have a more reasonable candidate filing fee.

I would really like to point out at this time that I think that this problem that we have about if a case involves an actual deprivation of voting such as the durational residency and those cases where the state has the burden of justifying the statutes by a compelling public interest as opposed to the old traditional rational basis test, it may not be an either/or. We really have the case here that perhaps because there is some association of voters involved there is, obviously, elections and some voting rights are tangentially involved, that perhaps there really is a test somewhere in between where there is neither a presumption of constitutionality nor such an overwhelming burden on the

state to justify the statutes and I think we are saying, really, under either of these three tests we think we have a sufficient quantum of state interests to justify these laws but we feel quite confident that the -- this case really doesn't fall in the same category as those cases which involve an actual deprivation of voting rights so that terribly stringent standards would be applicable.

Q You think there may be as many as three such tests?

MR. ULLERICH: That is what I am really suggesting that there might be --

Q Do you think there might be more than that?

MR. ULLERICH: -- the standard --

Q There could be an infinite number of tests, I suppose, couldn't there?

MR. ULLERICH: That's true.

Q Depending upon which test -- if a majority of the Court was -- had decided to invalidate a state law they would enunciate the test that was required to do so.

MR. ULLERICH: Just one quick point, the amicus brief that was filed by the American Civil Liberties Union cited an intermediate Court of Appeals decision in California, the Zapata, Z-A-P-A-T-A case which was decided last spring.

I really want to point out here that the California Supreme Court granted a hearing in that matter and the case

was argued before the California Supreme Court on September the 5th, 1972 and that Court has not issued a decision. Under California law, when the California Supreme Court grants a hearing, the intermediate Court of Appeal opinion is as dead as anything can be and I can only guess that perhaps our State Supreme Court is aware of this case and is deferring final judgment as a pilot case, so that case has no authority.

Q The Court didn't wait for us on the capital punishment case, did it?

MR. ULLERICH: I -- I really don't mean to second-guess that Court.

In conclusion, I merely want to say that I think a substantial but a reasonable candidate filing fee is necessary to further the state interests that have been averred to in many judicial decisions. There may be other means to accomplish those same goals, but we have practical history in California for over 60 years and many other states have fees that are in somewhat the same range. They vary anywhere from one percent up to 5 or 6 percent but I believe these other means are matters for legislative consideration.

We think the totality of the state interest that we describe do justify our candidate filing fees under the Equal Protection Clause.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Elman.

ORAL ARGUMENT OF PHILIP ELMAN, ESQ.,

ON BEHALF OF THE APPELLEES

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

The essence of this case, as we see it, is that the State of California bars a citizen from running for Congress or for almost every other elective public office unless he first pays to the state a substantial sum of money described, perhaps euphemistically, as a filing fee.

In the Chief Justice's opinion for the Court last term in Bullock, footnote 29, he indicates that the term filing fee is perhaps a misnomer since the amount of the fee bears no relation whatsoever to the cost of filing or processing the application. It is fixed rather on the basis of a percentage, in the case of California, one or two percent of the first year's salary for the office itself.

Q Mr. Elman, I am sure you have read the Bullock case more recently than I have in connection with this argument but wasn't the vice in the Bullock case that Texas was making the candidates in a primary bear the entire cost of the election as distinguished from any filing processes?

Wasn't that the essence of the Bullock case?

MR. ELMAN: Well, your Honor, certainly the --

Q And it was delegated to the political parties and not state officials.

MR. ELMAN: I wouldn't presume to tell the Court what the essence of a case so recently decided was, even though I have read it in the last few days.

Q But aren't those the facts?

MR. ELMAN: It was certainly a -- the Bullock case, the Bullock case, like this case, embodies a number of facts highly favorable to the candidate in attacking the constitutionality of the filing fee system. In Bullock, perhaps, the case was even stronger in that the fees were extraordinarily large, particularly in relation to the local offices.

Q $8,000 or $9,000 for some office holders.

MR. ELMAN: County judge -- county judge the fee could be fixed as high as $8,900 and the two offices that were particularly involved in the Bullock case, county commissioner fee was $1,400 and county judge, another office in another county was $6,300.

Now, the Court, as your Honor points out, emphasized that the full burden of the costs of conducting the primary election in Texas were imposed on the candidates and that had the necessary consequence of making the size of the fees very large and that was the factor, one of the factors, that was stressed in the Bullock opinion.

The Bullock opinion went beyond that and, as we read it, the Bullock case stands for the proposition that where a filing fee is imposed by the state and where it has

the effect of excluding candidates from access to the ballot and thereby necessarily disenfranchising their supporters, if a candidate is not on a ballot, his supporters have no opportunity to vote for him and in a very real sense, their right to vote in relation to them is not a meaningful, effective right so that the Court in Bullock was dealing, although the context factually was one with candidate filing fees, with an impairment of the right to vote and it applied to that classification based as it was upon wealth or the lack of it, influent affluence, poverty, money, a classification which the Court has held is a highly suspect one, a classification which had as its necessary result the impingement of the fundamental constitutional rights for the political association.

The Court applied the compelling interest test, held that the state had not borne the heavy, if not impossible, burden of justification that arises in such a case and held it unconstitutional.

Now, in this case, the fees imposed by the State of California are not as large. The candidates are not required, as in Texas --

Q The case, Mr. Elman --

MR. ELMAN: Peg pardon, sir?

Q Am I correct in recalling that in the Bullock case the Court invalidated the whole system of so-called

"filing fees" and by contrast, in this case, your brother has confirmed my understanding that in this case all that was held was that indigents could not be compelled to pray them, so isn't this, instead of being a Bullock-like case, isn't this more a Boddie-like case? Boddie against Connecticut?

MR. ELMAN: I'm not sure that the Bullock case can be distinguished on that ground, your Honor, because as I recall--

Q What was the ultimate holding in the Bullock case?

MR. ELMAN: The ultimate holding of the Bullock case was that --

Q That scheme was invalid, wasn't it?

MR. ELMAN: Was the declaration by this Court that the scheme was invalid.

Q Here there is no such holding. There is just a holding that indigents can't be compelled to pay their fees.

MR. ELMAN: The District Court -- the District Court dealt with this case on a basis of an application for a preliminary injunction and the state is here appealing from --

Q Right.

MR. ELMAN: -- the preliminary injunction so that we have not yet had a declaration of unconstitutionality by the District Court.

Q And the injunction --

MR. ELMAN: But here --

Q Was granted only to those who filed affidavits of --

MR. ELMAN: That's right.

Q -- inability to pay, isn't it?

MR. ELMAN: That's right, but the injunction was also so limited in the Bullock case.

Q Was it?

MR. ELMAN: Yes, sir, as I recall.

Q I didn't know.

MR. ELMAN: Unless my memory fails me very badly.

And, but the difference in the posture of the cases, here the Court has before it an appeal by the state from a preliminary injunction. In Bullock it had an appeal from a -- by the state from a District Court declaring the system unconstitutional -- does permit the Court, if it so chooses, to treat this case very narrowly and to -- and to deal only with the question of whether the California system has applied to indigents in its exclusion of indigent candidates from the ballot, is unconstitutional, leaving wholly open the question of the validity of this scheme as applied to someone who is able to pay and is willing to pay and so on. In many cases --

Q Maybe I have quite misunderstood the terms of the preliminary injunction, but I had understood it the way

I indicated and that would -- if I am correct in that, then, then it would be equally applicable if the fee were just one dollar a candidate across the board, if a person filed an affidavit that I am sorry, I haven't got a dollar, I am an indigent, I can't pay it, even though that were the fee, then under the reasoning of Boddie, if it is applicable to this situation, he could not be required to pay it.

MR. ELMAN: Mr. Justice Stewart, let me -- let me hasten to say that you are right in your reading of the preliminary injunction in this case. It is limited to application by --

Q Then why --

MR. ELMAN: -- indigent candidates and I agree with you, you do not have to go, and I am somewhat reluctant to tell your Honors how far you can go or should go or are required to go.

Q Mr. Elman, could we treat it even more narrowly than Justice Stewart has indicated and say simply that simply this was a preliminary injunction that Bullock afforded a reasonable argument for the Trial Court to grant preliminary relief and not even pass on the constitutionality in a final sense of the California system, even as applied to indigents?

MR. ELMAN: I can't disagree with you on that. If the Court chooses to treat this case so narrowly as raising

only the question of whether the District Court was justified on the basis of the preliminary showing made by the plaintiffs and the response of the state to grant a preliminary injunction, the state did come up here on a direct appeal. The state has argued the case as if it did squarely present the constitutionality of the California system. It is true that there are cases right behind this one that are coming along, that do raise the constitutionality of these candidate filing fee systems.

The language of the Bullock case, stressing as it did, and quite properly, the factual elements of that case. including the element that the entire cost of the primary was borne by the candidates, unlike the other states --

Q Yes, but a political committee, not an official, fixed the amount of the fee.

MR. ELMAN: Yes, that is right, sir.

Plus the fact that the Court did note probable jurisdiction, it did not affirm summarily, has led me as Counsel for Appellee to suggest to the Court that while affirmance is clearly required, there are several routes by which you can reach that, from our standpoint, desirable conclusion and one of the routes -- one of the routes is clearly marked out by, as Mr. Justice Stewart has suggested, by cases in this area, the principal one being Harper against Virginia Borad of Elections involving a fee of one dollar and

fifty cents where the Supreme Court held that the payment of any fee in any amount --

Q By anybody.

MR. ELMAN: -- by anybody -- thank you -- was a violation of the Equal Protection Clause of the 14th Amendment so whether it is $425 in the case of a man running for Congress or $850 for a candidate for the Senate or $982 for -- in the case of a candidate for governor, if -- if the fee cannot be justified by a legitimate state interest, regardless of the amount, it is unconstitutional and that would -- that, if the Court --

Q Well, if the fee can be justified as against those who can afford to pay the fee, it nonetheless might violate Equal Protection to charge it against somebody who could not possibly comply with the law because he is absolutely indigent, wouldn't it?

MR. ELMAN: According to the Harper case, the --

Q Even though court fees are presumably justified, we held in Boddie that they couldn't be assessed against somebody who absolutely was unable to pay them.

Q That is right.

MR. ELMAN: It doesn't mean that court fees are not wholly justified.

Q Well, it depends on the basis upon which the filing fee requirement is struck down. In Boddie, as in, even

in Griffin, the defendants in criminal cases who can afford to pay the transcripts of the record were required to do so.

In Boddie and in Griffin and in cases of that category, in the Crass which was up here earlier this term, you are dealing with -- you are dealing with requirements made by the state which are valid as applied to nonindigents. But when you are dealing with a fee on the act of voting as in Harper, then as I read the cases, the holding that the fee is unconstitutional applies not only to those who are too poor to pay the fee, but to those who have no difficulty paying it.

Q Mr. Elman, you, I think, in your brief, have made a point of the lack of any alternative on the part of the indigent person who wants to be a candidate.

Would you think, for example, that if in the California statute they provided that an indigent who could not pay or possibly that as an alternative for any person paying $425, you have a petition signed by 425 registered voters in the jurisdiction before a notary public requiring or requesting that he be placed on the ballot. Do you think that would be a reasonable alternative? Constitutional alternative?

MR. ELMAN: Your Honor, I would say that any requirement imposed upon any candidate, in order to test his seriousness, should be imposed on all candidates regardless of how much money they do or do not have.

Q Are you saying that as a matter of policy or constitution?

MR. ELMAN: I am asserting that as a matter of constitutional law. As a matter of constitutional principle, you can't classify -- you cannot -- excuse me, your Honor.

Q That's all right, go ahead.

MR. ELMAN: If I may finish the sentence.

As a matter of constitutional principle, when you are dealing with the right of franchise, you cannot separate voters on the basis of money. That is the proposition I put to the Court as simply and as bluntly as I can and if you -- if an indigent candidate for Congress is subjected to the burden of going around collecting signatures and a rich candidate is not subjected to that burden, I would submit to your Honors that that is a denial of the equal protection of the laws.

Q But you have one problem, constitutional problem, with a statute that required every candidate to file one percent of the voter's of the last preceding election for the same office, for example.

MR. ELMAN: Not only do I have no objection to that, I have suggested that in the case of Jenness against Fordson, in 403 U.S., where Georgia had a requirement that 5 percent of the eligible voters at the last election be required to sign petitions in order to get the candidate on the ballot

was a valid one, upheld by the Court.

Now, that requirement didn't -- wasn't made on the basis of money or race or color or some other classification which this Court has rejected as intolerable in relation to fundamental constitutional rights like voting and political association and free speech. Now --

Q Mr. Elman, I am sure you have had enough experience in these matters to agree that probably if there were such a requirement that the courts would soon be confronted with the claim that for an indigent person the requirement of getting one percent, two percent or five percent of the signatures on a petition is costly and burdensome and therefore it should be waived with respect to indigents.

MR. ELMAN: That is one question I would leave to the future. I certainly wouldn't decide that one today.

Q I think we will leave it there, too, but I agree that that is inherent in this kind of problem.

MR. ELMAN: I think it may very well arise, but I think that if, as we urge, a state candidate filing fee system which excludes candidates from the very political process which lies at the heart of our constitutional system which closed the door to them at the threshold simply on the basis of money, if such systems are struck down, the participation of poor candidates and poor voters in the

political processes which may result as a consequence of that action, would, I would quote, minimize the kinds of cases which were increasingly coming before the Court now in which indigency is being asserted as a basis for unconstitutional classification.

Q Mr. Elman, if you regard the answer to the Chief Justice's question as an open one, that is that perhaps ultimately it would follow that not only a money filing fee would be struck down, but that a petition signature-collecting requirement would be struck down, then in effect the state could do nothing constitutionally to prevent every highschool civics student from running for supervisor, as Mr. Ullerich suggests.

MR. ELMAN: I wasn't suggesting that the question raised by the Chief Justice should be answered one way or the other. I was suggesting only that that question seemed to me so remote that it should not be dealt with her and that I was hoping that a clear-cut decision by this Court affirming not on the narrow ground that has been suggested but on the broad ground that any filing fee, no matter how reasonable or valid in relation to non-indigents, is unconstitutional because it isn't supported by any legitimate state interest, whether it is a compelling state interest or otherwise. The notion, the notion that the seriousness of a candidate should be measured by the size of his purse, that you equate

seriousness of purpose politically with how much money you have, is absolutely contrary to everything this Court has ever said.

Q Would you concede for the purpose of your argument here that the state does have a legitimate interest in somehow minimizing the choice the electors have to make from among the potential candidates for an office, that you wouldn't want 60 candidates for county supervisor on a primary ballot?

MR. ELMAN: Yes, your Honor, the Court has stated in Jenness and Fordson; it has restated it in the Bullock case that the state certainly has a legitimate interest in protecting the integrity of the ballot in weeding out frivolus, fraudulent candidates and preventing the ballot from becoming so overcrowded that voters are confused, et cetera, et cetera.

That certainly is a legitimate interest of the state.

My point is that the way to weed out the frivolous, fraudulous candidate isn't to subject him to a financial means test.

Q What is it?

MR. ELMAN: Beg pardon?

Q What would a way of doing it be?

MR. ELMAN: Well, you -- you suggested that, your Honor in your opinion --

Q In Jenness.

MR. ELMAN: In Jenness.

Q Well --

MR. ELMAN: IF you --

Q -- Georgia suggested it. I just said it was a pretty good and valid suggestion.

MR. ELMAN: Well, I think the -- I think your statement of it, from my point of view, carries more weight.

The -- if the test is, is he a serious candidate, does he have a significant modicum of voter support, if that is the test, you don't -- you don't apply it on the basis of a money yardstick. Now, a money yardstick, while it may keep out the poor candidate who isn't a serious candidate in the sense that he may not win the election, does not keep out the nonserious fraudulent fictitious candidate who is motivated --

Q To advertise his automobile business, for example and may have plenty of money. Is that your point?

MR. ELMAN: That is one kind of fraudulent candidate. You may have a fraudulent candidate --

Q He may not be a fraudulent candidate, but his purpose in getting on the ballot and running is to advertise his used car business.

MR. ELMAN: There is no limit to meritricious motives of -- the candidate may be on the ballot simply because he has the same name or a very closely similar name as somebody else. Now, if he has enough money, California

will put him on the ballot. If he doesn't have the money, even though he is a serious candidate, like Mr. Chote, he is off the ballot.

Now, in regard to some of these abstract questions, may I state the facts concerning Mr. Chote which are a matter of public record?

He is unemployed. He has no -- he has proceeded in this Court and the Court below and he is in forma pauperis. He filed the necessary affidavits in the District Court that although he was a qualified candidate for Congress, he had no funds.

Q What election is he a qualified candidate for now?

MR. ELMAN: Well --

Q I mean, was he put on the ballot in the last election?

MR. ELMAN: He was put on the ballot by order of the District Court, the decree of the District Court which the state is here appealing from.

Q Last summer?

MR. ELMAN: He ran in the 17th Congressional District in California, the district that is represented by Congressman McCloskey. He ran in the Democratic Primary. He got on the ballot because a three-judge Federal District Court ordered the state to put him on and that is how he got on there. His

His campaign expenditures were zero. He reported to the clerk of the House of Representatives and it is a matter of public record that he spent not one cent. He had no campaign headquarters. He didn't advertise. He had no campaign mailings. He had no staff. His campaign consisted of himself and he -- he got 3,741 votes out of a total of 70,000 votes that were cast.

There were five candidates. He finished fourth out of the five. The winning candidate got 27,000 votes. Mr. Chote's campaign slogan was, "If you vote for me, you are going to be voting for somebody who is not beholden to any special interest." Now --

(Laughter in the Courtroom.)

Q Does anybody know how many people voted --

MR. ELMAN: 3741 people --

Q Voted for him.

MR. ELMAN: Voted for him.

Q Well, there's a --

MR. ELMAN: Now, if that doesn't make him a serious candidate. I don't know what does.

Q I don't see how he could publicize that slogan, how anybody knew about it.

MR. ELMAN: He went from door to door. He rang -- he rang doorbells.

Q Well, that cost him money, from an economist's

point of view.

MR. ELMAN: It was an expenditure of --

Q Yes.

MR. ELMAN: -- of a sort which I think -- I think the Constitution and the First Amendment tend to encourage and to preclude people like Mr. Chote from access to the ballot, from participating in the political processes, to uphold the position of the state in this case would mean that if the Constitution tolerates disenfranchisement of the poor, that it permits, it sanctions keeping the poor, who we know are the most apathetic group of the electorate from having a stake in the process, from participating in it.

Now, there have been several arguments made by the state in the course of the brief. I don't know whether I should burden your Honors with any further argument.

There is a suggestion, well, if any candidate is a serious candidate for Congress, he can certainly raise $425. If he doesn't have the money himself, if he has got any serious support, why doesn't he go down and push doorbells and get a dollar from each voter?

Now, consider the implications of that. The state is telling this Court that in order for voters to get their candidate on the ballots, they can exercise their right to vote for him, they may be required to pay one dollar in the way of a fee or a tax.

Now, if that isn't -- that's Harper against Virginia Board of Elections with a vengeance. There, at least, the state had a poll tax that everybody had to pay. But the State of California would be requiring these 425 people, in order to vote for their candidate, to pay a poll tax. It would be selective and discriminatory and, while I haven;t suggested it in the brief, I think it would clearly also violate the 24th Amendment which makes it clear that the candidates for -- which makes it clear that with respect to voting in federal elections, neither the United States nor the state can impose any poll tax or any other tax and I don't think calling this a filing fee precludes or concludes the constitutional question of whether it constitutes a tax on the privilege of voting.

Q Would you concede, Mr. Elman, that this statute of California, like any statute of any state, comes to this Court or any court with a presumption that it is constitutionally valid?

MR. ELMAN: Yes, indeed. I would also state what doesn't have to be stated to your Honors that ever since that famous footnote in Caroline Products, when you are dealing with fundamental constitutional rights like freedom of speech and rights of voting, there has been an awful lot of law as to the burden that rests upon the state and as recently as Mr. Justice Blackmun's opinion for the Court in Rowe against

Wade, it was stated that when fundamental rights are concerned, any regulation -- fundamental constitutional rights are concerned, any regulation of the state must --

Q Is it constitutionally invalid?

MR. ELMAN: No, not at all, that a heavy burden of justification rests upon the state and --

Q Well, once you say that --

MR. ELMAN: I didn't --

Q -- do you know of any opinion which uses the phrase heavy burden of justification or close judicial scrutiny or a compelling state interest? Any of those three phrases? Any opinion of this Court in which the decision is other than to hold the statute invalid?

MR. ELMAN: Well, for example, I think Mr. Justice Marshall's opinion for the Court last year in either Dunn and Blumstein or Chicago Police against Mosley, in talking about the burden on the state, says that regardless of how you phrase the standard --

Q That the burden is on the state, isn't that right?

MR. ELMAN: It puts the burden of justification on the state where the classification-- where the classification impinges upon First Amendment or voting rights.

Q Where is the First Amendment right here?

MR. ELMAN: Oh, the First Amendment right in this

case is the right of political association. The support is (sic) the candidate -- who associate for the purpose of supporting him. You certainly have the right to vote --

Q Not the right to vote.

MR. ELMAN: You have the right to vote which comes from Article One, Section two.

Q Well, no, but if you have ever read Miner against Haperstadt, it holds that there is no constitutional right to vote and if that hadn't been true, there would have been no need to have a 19th Amendment to the Constitution giving women the right to vote. You would agree with that, wouldn't you?

MR. ELMAN: I've read as recently as Harper against Virginia Board of Elections citing the classic case that the right to vote in federal elections comes from Article one, Section two of the Constitution of the United States.

Q Are you familiar -- Mr. Justice Frankfurter, it is one of his favorite law review articles, other than those of which he himslef had been the author -- it was a famous one in the Harvard Law Review that he once told me he had required all his law clerks to read when they first came. Was it by Thayer, in the Harvard Law Review?

MR. ELMAN: Yes, sir.

Q Having to do with the presumption of validity

of any statute?

MR. ELMAN: I read it only last night, your Honor.

Q Can you give me the citation, offhand?

I was looking for it the other day.

MR. ELMAN: I think you will find it in one of the earlier volumes. I can't give you the exact citation.

Q I think it is 37.

MR. ELMAN: Thirty-seven. I was about to say that but I was afraid that I would be wrong.

Q What about 37?

MR. ELMAN: It's around 37.

Q Thank you.

MR. ELMAN: Thank you very much, sir.

MR. CHIEF JUSTICE BURGER: Do you have anything further? You have just a couple of minutes?

REBUTTAL ARGUMENT OF HENRY G. ULLERICH, ESQ.,

ON BEHALF OF THE APPELLANT

MR. ULLERICH: Only on the question of Boddie versus Connecticut which came up and as I recall, that was the case where the fundamental relationship of divorce, certain people would not have to pay the court filing fees in order to get access to the Court.

It seems to me that the state interest in that case was merely the loss of a very nominal amount of revenue to process the actual papers. I think the state

interests are substantially different in this case because of the ballot control fragmentation of vote and so forth. It is really not just the matter of the state is only losing the $425 fee, it is the matter of the effective control of the ballot.

Q Actually, that case was decided under a different porvision of the Constitution than the one at issue here.

MR. ULLERICH: The due process. That's right, your Honor.

I have nothing further.

Q But it may be that you can say the state has a legitimate interest in doing -- well, a legitimate interest in limiting the ballot. But don't you also have to demonstrate that what you are doing contributes to that end, substantially contributes to that end. Your opponent argues that it doesn't contribute anything to that end, really, because anybody with money can get on whether he is serious or not.

And the people who can't afford it may be kept off even if they are quite serious.

MR. ULLERICH: Well, I think that would be true if you talk about the $10 or $15 fee, your Honor, but I think if you are talking about what we term have been judicially declared --

Q But if it is so easy -- if it is so easy, the

state end isn't served anyway.

MR. ULLERICH: Well, what I am saying is that if we are talking about $400 or $500, I think the stripteaser or the car salesman, for instance, is going to think twice before they use that as a mode of advertisement or public relationship, even if they have the money to pay. It has to be large enough to discourage that type of candidacy. I think $400 to $500 is.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Elman, you came here at our request and by our appointment, and on behalf of the Court, I want to thank you for your assistance to the client in the case and your assistance to the Court.

MR. ELMAN: Thank you very much, sir.

(Whereupon, at 11:39 o'clock a.m., the case was submitted.)