In the

Supreme Court of the United States

THOMAS TONE STORER, ET AL., Appellants, vs. EDMUND G. BROWN, JR., ET AL., Appellees.	No. 72-812
LAURENCE H. FROMMHAGEN, Appellant, vs. EDMUND G. BROWN, JR., ET AL., Appellees	No. 72-6050

Washington, D.C.

November 5, 1973

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Washington, D. C.
Monday, November 5, 1973

The above-entitled matter came on for argument at 11:32 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:

PAUL N. HALVONIK, ESQ., 680 Beach Street, Suite 436, San Francisco, California 94109; for the Appellants, Thomas Tone Storer, et al.

JOSEPH REMCHO, ESQ., 593 Market Street, Suite 227, San Francisco, California 94109; for the Appellants, Gus Hall, et al.

CLAYTON P. ROCHE, ESQ., Deputy Attorney General of California, 6000 State Building, San Francisco, California 94102; for the Appellees.

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C O N T E N T S

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Afternoon session begins at page 25.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-812 and 72-6050, Storer v. Brown and Frommhagen v. Brown.

Mr. Halvonik?

ORAL ARGUMENT OF PAUL N. HALVONIK, ESQ.,

ON BEHALF OF APPELLANTS, THOMAS TONE STORER, ET AL.

MR. HALVONIK: May it please the Court, Mr. Chief Justice: My name is Paul Halvonik. I am one of the attorneys for the appellants here. The other attorney for appellants is on my left here, Mr. Remcho. I will consume 20 of the allotted 30 minutes, and Mr. Remcho 10. I would like to speak first fir 15 minutes and then reserve 5 for rebuttal, if I may.

The appellants in these cases are candidates for public office and their supporters. All of the candidates are unaffiliated with political parties recognized by the State of California. That is to say none belong to any political party that has a place on the California ballot. They brought suit to obtain ballot space last general election.

Q You mean recognized --

MR. HALVONIK: That's right, there is no line for them on the California ballot. Two of the appellants are members of the Communist Party, but the Communist Party is not a recognized party in California. The other two appellants, Storer and Frommhagen, belong to no political party at all in any sense of the word.

In California, people who are not members of political parties are deemed "declines to state" and are independents in that sense, and so we have two sets of independents, genuine independents, and people who are independents because their political party isn't recognized in the state.

They brought suit to obtain space on the ballot as independents and challenged the restrictive scheme of the California election law for regulating independent access. The scheme in brief is this: They have to obtain five percent of the registered voters, the signature of the registered voters in a 24-day period, that period begins long after the primary elections, August 15, and ended on September 8. No one could sign one of those petitions who voted in a primary, even though nonpartisans vote in California primary elections. They are given a nonpartisan ballot that doesn't have such offices as Congressman and Senator on it but has ballot propositions and local officers, county and city, which are nonpartisan officers in California. You can't have a party designation for those officers.

Q Now, what you are getting into now is something that I didn't quite understand from my reading of the briefs. A person can go into a Republican primary and vote, say, say it is a Republican primary, and it would be true about a Democratic primary, and vote although he declines to state that he is a Republican in the one case or a Democrat in the other. And does

he vote for a --

MR. HALVONIK: No.

Q What does he vote for in the Republican Party?

MR. HALVONIK: In a primary election you have a Democratic primary, a Republican primary, two other primaries. Additionally there are ballot propositions, numbering usually somewhere in the neighborhood of twenty each year, about twenty ballot propositions, dealing with all kinds of legislation.

Q That is to put issues onto the ballot at the general election?

MR. HALVONIK: Decide legislation, you decide legislation in California by ballot.

Q You do that at the primary election and not the general election?

MR. HALVONIK: At both.

Q Either one?

MR. HALVONIK: Yes, they appear on both ballots. They are diferent time periods, and sometimes you make a June ballot and sometimes a November ballot. The June ballot comes out at the primary election, but the nonpartisan is a person who is not registered with any political party --

Q I see.

MR. HALVONIK: -- goes down to the place where he casts his ballot and is given what is called a nonpartisan ballot, and on that will appear all the ballot propositions.

Partisan officers, what are called partisan officers in California do not appear on that ballot. That is, he doesn't vote for anybody for Congress or Senate or President, but he votes if the election is coterminous for such officers as city councilman and supervisor on that ballot.

Q Which are nonpartisan?

MR. HALVONIK: Which are nonpartisan. And so you have a person who goes to the primary election and casts a ballot and under the California election scheme, although they haven't participated in the partisan primary, they are not permitted to sign nominating petitions for independents.

Q Because he voted at what is a primary election held on the same day as a primary election, although it itself is not a primary election? Is that right?

MR. HALVONIK: It is not by most persons' terms a primary election, although it is so-called in California.

Q Well, I have always understood a primary election to be one where there are candidates for the nomination of a particular party and I vote for one or other of the candidates. But that is not what you are talking about?

MR. HALVONIK: No. No, California is a bit different. In the early part of the century there was a great rebellion against the party system and California set up a cross-filing system so that people who belong to one party could run in the other, it removed any party designation from the ballots at

local elections. It set up the initiative in referendums so that these ballot propositions appeared at that time.

Q I know, but at the time of the election --

MR. HALVONIK: THey kept calling it a primary election.

Q But at the election we are talking about, there were candidates for nomination in both the Republican and the Democratic Parties or perhaps other parties for some things.

MR. HALVONIK: Yes.

Q And in addition to that there were these non-partisan things that you speak of.

MR. HALVONIK: Partisan ballots which Storer, one of the appellants here, cast --

Q But it is still called a primary election, is it?

MR. HALVONIK: Yes.

Q And anyone who voted, if he voted only on the matter of those initiatives or whatever those propositions were, that then disqualified him from signing one of these petitions after August 15, is that it?

MR. HALVONIK: The code section so reads and that is what the lower court held.

Q So the voter on primary election day, when he goes down to the polling place, and he can say I am a Republican, in which case he is given a ballot containing the various aspirants for -- to be nominated by the Republican Party, plus the issues and nonpartisan candidates, or he can say I am a

Democrat in which case he gets the Democratic ballot plus the issues, or he can say I decline to state in which he gets only the latter?

MR. HALVONIK: That's right. That's it, exactly, although he would make his declaration before election day. He has to be registered before then.

Q I see.

MR. HALVONIK: Well, anyway, those people are excluded from signing the petition and the appellant Storer is also, since he cast a nonpartisan ballot, excluded by virtue of that from running for office as an independent; and further he is not permitted to run as an independent because some ten months before the general election he was registered as a Democrat, and California requires you, if you have been a member of a political party, to wait 17 months before an election before you can be an independent.

Q Is that what it says, 17 months?

MR. HALVONIK: Well, it is a period 12 months before the primary election, and then you add the five months between the primary and the general, and it comes out at about 17 months.

Q But that is before you can be a candidate, not before you can vote in a primary, isn't it?

MR. HALVONIK: Before you can run as an independent candidate --

Q A candidate.

MR. HALVONIK: -- you have to purge yourself of any party affiliation some 17 months before the general election.

Q Before you can be a candidate as an independent.

MR. HALVONIK: Right. And Storer here sought -- and there is an affidavit in this -- he sought to get his nominating papers out, and they told him he couldn't have them because he had been a registered Democratic within the preceding 17 months.

Q Right.

MR. HALVONIK: Now, this --

Q Could I ask, to what does the 5 percent in number apply?

MR. HALVONIK: It is the entire vote in the area. So if you are running for Congress, it is 5 percent in your congressional district, 5 percent of the people who voted at the last general election. If you are running statewide, it is 5 percent of the entire vote in the state.

Q Well, now, for the purposes of the cases we have before us, what was the elimination from the 5 percent by virtue of having voted at a primary election, in numbers?

MR. HALVONIK: Well, it is our estimate, and it was the estimate of the Secretary of State at the time the election was being held, that about 70 percent of the people would vote in the primary.

Q You have to get then 5 percent of the total out of the 30 percent?

MR. HALVONIK: That is correct, although of course you can get additional registration, go out with the registration book and get additional people to register, if you are in a district with very low registration. That is one way where you can conceivably meet these requirements. In fact, after we brought this suit, somebody did, a man named Raul Ress, in the 40th District Assembly of California, which is the smallest assembly district, where all he needed as 1,800 signatures, a large Chicano population, and averaging an assembly district, which is half a congressional district, about, is 4,500 signatures needed. He needed but 1,800 signatures, very low registration, went into Chicano communities and promoted himself as a La Raza candidate and was able to make the ballot, the only one as far as we know who ever made it under the current California independent provisions.

The system is justified by the State of California on the grounds that it makes for a manageable ballot in size, and their justification, we contend, is transparently untenable because the state also points out a few times you could have a hundred political parties in California. There are four at the moment. Actually, mathematically, it is possible to have more than one-hundred. And so the interest in a manageable ballot only occurs when you don't want to be affiliated with a political party, the old party staying on if they have one-fifteenth of one percent of the registered vote and if

they collected only two percent of the vote in the last election. A new party need collect just one percent of the electorate as registered voters in its party and it gets a place on the ballot. So the manageable ballot excuse won't go, and the state then justifies the provision on the grounds that it may legitimately promote political parties as distinguished from independents and even keep independents off of the ballot if it wishes, and that is where we take issue with the state.

The First Amendment to the United States Constitution, as we understand anyway, is supposed to promote a free market place of ideas, and a statutory system valid in design to restrain trade and ideas does not seem to us to comport with the First Amendment but to affront it. We are dealing here with a fundamental right, the right to vote, and the ballot -- we are speaking of the right to vote in First Amendment terms, this is a quote referred to in Williams v. Rhodes -- is sort of a forum, and while the state, when it opens the forum, in this case the ballot being the forum that is opening, even though it needn't open the forum, once it opens the forum it has to use neutral principles to decide who gets access to that forum. It can't decide on the basis of preferred political content or preferred political associations who get on the ballot. But that is what California does, and that is what California claims it is doing.

Q Mr. Halvonik, do I understand from what you have

just said that you're posing your case basically on First Amendment principles and not at all on equal protection?

MR. HALVONIK: Well, it is equal protection principle that is related to First Amendment principle. Under the equal protection idea is when one opens up a park, for instance, a city maybe doesn't have to build a park, but once it does, if it is going to issue permits for speakers in the park it has to issue them in a neutral manner. And that is sort of the combination of the equal protection and First Amendment values I should think. But we are relying on equal protection of the laws, that is the basic claim for this, that the state, once it provides ballot space has to do it in an even-handed manner, and this is connected and interrelated with the First Amendment question of political neutrality in deciding what standards are used to get on the ballot.

Q You are claiming a denial of freedom of association here, as I understand it.

MR. HALVONIK: The state discriminates against people who seek ballot positions because they don't have particular kinds of associations.

Q And the answer to that is not that -- he is merely asked to forego the vote and he can associate all he wants to?

MR. HALVONIK: Has to forego getting on the ballot -- yes, he can forego all the wants to, and the state merely

penalizes him by moving him from the process and removing him -- and removing his supporters from the electoral process effectively and forced to have on their ballots only those candidates who they don't wish to support.

Q Well, this sounds to me more like 14th Amendment than First, I think, but --

MR. HALVONIK: Well, I think the First is helpful this way, Mr. Justice Blackmun, in deciding what standard is then used to determine who is being irrationally discriminated against, and we maintain that the First Amendment sort of standard applies here, the close scrutiny standard, and that what we are involved in is the exercise of the fundamental right, First Amendment rights, as amended in this Court's opinion in Williams v. Rhodes.

The discriminatory system against those unaffiliated with political parties is reflected not just in the ballot direct access question but in the statutes which prohibit it historically from being on the ballot. We've already discussed his casting of a partisan primary ballot excluding them from he party, and I mentioned also that he was excluded because he hadn't been a member of a -- he had been a member of a political party in the preceding 17 months, and we contend that there is no justification for that provision.

It is one thing to require somebody to be a member of a party for a certain amount of time before he may run as that

party's candidate to establish his adherence to whatever general principles that party may have, but an independent by definition you are saying he is not associated with any group of political ideas, associated with any particular political party. The State of California says, well, when he goes he is splintering the party, but splinter is just a jeorative for independent. And I would think political party cannot stand people disaffected leaving the party, cannot stand the competition at the ballot when these people meet reasonable qualifications to get on the ballot, the political party perhaps doesn't have wares the people want to buy, and I don't see where the state has a legitimate interest in insulating that political party from what it would term splinters. I don't know who decides what the splinter is.

Q Did you argue this case in the Seventh, too?

MR. HALVONIK: Mr. Remcho argued it that time, Mr. Justice Douglas.

Q Oh, for Mr. Storer?

MR. HALVONIK: Yes, for Mr. Storer and Mr. Roche appeared for the state at that time.

Q And you thought the law was so well settled that I should put him on the ballot forthwith?

MR. HALVONIK: Well, we hoped it was that way. I don't know that it was our hope that it was well settled. We felt that it followed pretty much from Williams v. Rhodes that

they were entitled to a ballot position, and we thought further that the state couldn't make the manageable ballot argument because, as we pointed out, the interest only arises when you are unaffiliated with a party, it is a four-party state, and we felt further that the state can't maintain that it has a legitimate interest in promoting political parties, people affiliated with them to the exclusion of those who have no political party affiliations.

MR. CHIEF JUSTICE BURGER: You are now to Mr. Remcho's time.

MR. HALVONIK: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Remcho.

ORAL ARGUMENT OF JOSEPH REMCHO, ESQ.,

ON BEHALF OF APPELLANTS GUS HALL, ET AL.

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

First, in response to Mr. Justice Douglas' question --

Q I was just refreshing my recollection.

MR. REMCHO: Okay. We thought at the time, at any rate, that the irreparable injury, that there was no injury to the state but there would be injury to Storer in that case.

I am addressing myself to the issue that independent candidates, to get on the ballot, may not have been a member of a political party for the preceding 17 months, and may not have voted at the preceding primary. In our view, that adds

qualification for the California Legislature to those set forth in Article I, section 2. In this Court, in Powell v. McCormack, said that the national legislature may not add to those qualifications age, citizenship and inhabitancy. If the national legislature cannot, surely the state may not, and in fact the appellees have conceded this point.

They argue, however, that a person can be elected to Congress in two other ways besides meeting those additional qualifications. That is, they argue you can be a party candidate or that he can succeed at a write-in, on the write-in in the California election. These possibilities really in our view constitute merely alternative qualifications.

To restate the California scheme, a person, to become a member of Congress, must either first be a member of a recognized political party, that is the party route; second, must not have been a member of the party for the preceding 17 months, and further had not have voted, this is this independent route we are challenging; or, third, he must run as a write-in candidate, with no chance of success in California.

I think the issue this Court will want to address itself to is the validity of the write-in as an option. I think it can be viewed in one of two ways, either it is that alternative qualification that a person must be so widely supported by people in California that he can gain election even when his supporters have to write in and the supporters of others may

merely go down and check them, mark them in a voting machine. Or, secondly, we can say that the party route and the independent route are the additional qualifications for Congress, and that the alternative which the state provides is really an unrealistic alternative, it is impossible an alternative under current California procedure.

The appellees attempt, I think, to show that there is a write-in alternative really shows quite the opposite. The only example they can come up with is the case in which a person who was a Democratic incumbent and already on the ballot for the Democratic primary won a Republican primary by write-in when no one was on the Republican ballot. That is, someone had to win by write-in. There was no other way to do it.

Q Mr. Remcho, if you are right on the point you are aruging here, then wasn't Lippit v. Cipollone wrongly decided?

MR. REMCHO: I think the Court in Lippit, that is the lower court, Your Honor, did not address fully that issue of Article I, section 2. It was passed on, it was not fully explored. I think I am correct, it was wrongly, maybe wrongly decided. Secondly, however, that is distinguishable from this case in that in Lippit there was a fee, and I suppose arguably the candidate in Lippit could have raised the fee, but in this case he can't.

Q But the Ohio rule was surely an added

qualification which the state couldn't impose over and above those set by Article I, just as much as the California qualification.

MR. REMCHO: I think that is right, Mr. Justice Rehnquist. I would say, number one, it was wrongly decided. This Court dismissed on the grounds of lack of jurisdiction, did not --

Q No, I think it summarily affirmed.

MR. REMCHO: Excuse me, I am thinking of the other case. But I think that can be distinguished here because there is no way that Storer can get away from California's requirement, that is, having voted, having exercised his franchise and having been a member of the party, he is now further incapable of getting on the ballot in California, whereas in Lippit at least someone else could have come in and said here is the money and you can go.

Again, as to the write-in alternative, this Court, in Classic, United States v. Classic, which extended what it considered to be a fundamental right to vote in congressional elections, to primary elections, did so on the grounds that the primary election so profoundly affected the general election --

Q That opinion used the term fundamental right or constitutional right?

MR. REMCHO: They used the term constituti nal right, Mr. Justice Brennan.

Q I wonder why you don't.

MR. REMCHO: I will in the future. But I think that case, which also spoke of Article I, section 2, not specifically to the qualifications but as one of the bases for that constitutional right, did so because it dismissed the write-in because the write-in procedure in the primary so profoundly affected the election --

Q That was a right there whose vote counted?

MR. REMCHO: No, that is a case -- that's right, to be counted and also to be a candidate, Mr. Justice.

Q United States v. Classic was a right of a voter at a primary to have his vote counted.

MR. REMCHO: That is correct.

Q That is all that was involved.

MR. REMCHO: I think not, Mr. Justice Marshall. The decision -- this was a case in which to decide whether or not the defendants in that case had violated a constitutional right. The Court said it had to meet two issues, first, whether or not a voter had the right to have his ballot counted; and, secondly, the Court did say that it had to meet the issue whether or not a person had a right to be a candidate. One might say that that really wasn't necessary in the case.

Q Right to be a candidate, the Classic case?

MR. REMCHO: That's right, to be a candidate and to have those counted for him.

I think further that -- I think the issue has been settled by Powell v. McCormack, and that Mr. Justice -- excuse me -- Chief Justice Warren in that case gave some guidelines for looking at cases of this sort, where qualifications are alleged. And he said that even had the legislative history in that case not been as clear as it was, and the constitutional history not been as clear as it was, the Court nevertheless would have been compelled to resolve any ambiguity in favor of a narrow construction of the scope of Congress' power to exclude members, because, in Hamilton's words, the people should choose whom they please to govern them. I think in this case any ambiguity as to whether or not the write-in is an effective alternative ought to be resolved in favor of the people's right to elect to Congress those people whom they choose and not whom the California Legislature chooses.

If there are no questions, I will reserve the remainder of my time for Mr. Halvonik's rebuttal.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Roche?

ORAL ARGUMENT OF CLAYTON P. ROCHE, ESQ.,

ON BEHALF OF THE APPELLEES

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

Our basic position is completely different, of course, than the appellants'. The Appellants have very

studiously avoided this Court's decision in Jenness v. Fortson, and it is our position that we look to Jenness v. Fortson for the guidelines as to how California's law and its constitutionality should be decided.

It is clear, when we look at California's law, that California has preserved the fluidity of political life and has not frozen the status quo. That was the key to Jenness v. FOrtson, as alluded to by appellants very rapidly as in their argument. California has not two parties but has four qualified parties presently. Besides the Democratic and Republican, we have the American Independent Party and the Peace and Freedom Party. So obviously we are not at a Williams v. Rhodes situation, where the political life of California has been frozen for the Democrats and Republicans.

Also, there has been little said about section 6430 of the California Elections Code. We feel that section 6430 of the Elections Code in and of itself, without even reference to the independent nomination procedure, satisfies all the constitutional rights of the appellants and other electors in California.

Under said provisions, as have been explained, an old party can remain on the ballot if it gets 2 percent of the previous vote. Secondly, if they have 1 percent registration 135 days before the election, they also become a qualified party. Additionally, they can become a qualified party by getting a petition with 10 percent of the number of voters at the

last gubernatorial election.

We also have the write-in process in all elections, primary, general, state and local offices, federal office, and the presidential elections. So we haven't even gotten to the independent nomination procedure, so obviously if any group of electors wishes to organize and exercise their First Amendment rights under the provisions of Section 6430 of the Elections Code, they may do so as did the American Independent Party and the Peace and Freedom Party in 1948. Also in the past we have had other qualified parties, as alluded to in our brief. We have the -- in the fifties we had the -- and into the sixties -- we had the Progressive -- excuse me -- the Prohibition Party was a qualified party, and also for a while we had the -- I believe it was the Progressive Independent Party in the fifties.

Q And how many voters does it take to organize a new party, Mr. Roche? One-fifteenth of one percent?

MR. ROCHE: One percent of the registration. Now, the one-fifteenth is an additional qualification to stay on the ballot. There is a provision in section 6430 that says if at any time the registration falls within one-fifteenth of one percent, then they are automatically off, no matter what they got the last time. Now, that is interesting from the point of view that in Georgia, in looking at Georgia's five percent of the last vote requirement, they could have had zero because they don't have that added qualifications, and the Court still

upheld Georgia's five percent requirement in Jenness v. Fortson.

Q I don't follow that.

MR. ROCHE: Well, in other words --

Q I mean, Georgia was more liberal, a party still stays on the --

MR. ROCHE: Well, a party can stay -- that's right, it -- no, they could have zero, it would be more restrictive in that even if they had zero registration, even if they had 20 percent, excuse me, not the five percent, the 20 percent of the vote requirement for an old party to stay on.

Q Yes.

MR. ROCHE: Their registration could go down to zero and they still would have been a qualified party.

Q They are more liberal and less fluid.

MR. ROCHE: So basically what I am saying is that without reference to the independent nomination procedure itself, the fluidity of political life is taken care of in California. Now, insofar as --

MR. CHIEF JUSTICE BURGER: We will resume there right after lunch, Mr. Roche.

[Whereupon, at 12:00 o'clock noon the Court was recessed until 1:00 o'clock p.m.]

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AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: You may proceed, Mr. Roche.

MR. ROCHE: Thank you, Your Honor.

As I was saying before lunch, I was outlining how under the provisions of section 6430 of the California Election Code the fluidity of political life is preserved without even reference to the independent nomination procedure which is solely attacked in this particular law suit.

Additionally, of course, we have the write-in process in all elections, so therefore we get to the question of what scope of review should be used here, and it is our position that in view of the fact that section 6430 takes in addition and in conjunction with the write-in process already preserves the constitutional rights of electors in California, that the independent nomination procedure really essentially has -- its existence or no has very little impact upon the voters in California, therefore under the test set forth by this Court in Bullock v. Carter, the rational basis test should be used in examining this provision instead of the close scrutiny test. And in this regard, it would seem that we are essentially talking about a case which involves a barriers to candidacy as opposed to the right to vote per se as found in such cases as Carrington v. Rash and the Kramer case, the Cipriano case, and so forth, which were direct infringements upon and direct disenfranchisements.

However, despite the fact that we feel that only the rational basis test need be used, we feel that even should we examine the California independent nomination procedure in a vacuum, so to speak, that each of its substantive provisions are necessary to further compelling state interests of the state.

Now, taking these elements individually, we first of all have the 5 percent signature requirement, section 6831. Well, of course, this Court has recognized unqualifiedly that, in Jenness v. Fortson, that a significant modicum of support is proper to prevent proliferation of the ballot and to also prevent confusion, deception and even frustration of our electoral system.

Three-judge district courts have elevated this in itself to a compelling state interest. For example, Bendinger v. Ogilvie, which is cited in our brief, and Beller v. Kirk, which was affirmed sub nom., as Beller v. Askew, by this Court. In fact, when you examine California's five percent requirement vis-a-vis Georgia's five percent requirement, you will find that California's five percent requirement is really about a three and a half percent requirement, because Georgia uses a different test. Georgia used a test of all of the electors who were qualified to vote at the last election, whereas California uses the test of those people who actually voted for that office, then using the 70 percent test that appellants use all the time, that would come out to about a three and a half percent require-

requirement on Georgia's scale instead of a five percent requirement.

Additionally, we point out that appellants apparently do not seriously even contest the five percent requirement in and of itself, and we presume it would be difficult for them to do because of Jenness v. Fortson and cases such as -- excuse me, not Bendinger v. Ogilvie, it was Jackson v. Ogilvie, and Beller v. Kirk.

Now, weaving on to 6830(c) of the California Election Code, wherein it restricts the signatories to those who have not voted at the primary election, now there is much discussion as to what is a primary election in California. Now, our position below at the District Court level was that in California the primary election held in June is in reality a series of primary elections, essentially a consolidation of a group of primary elections, one for each party. Therefore, in 1972, we would have had a primary election for four parties and a separate primary election basically for declines to state.

Now, we have cited a case, a California case --

Q When you say a series, all on the same day or on --

MR. ROCHE: It is all at the same time and --

Q They all go to the same polling place, don't they?

MR. ROCHE: Yes, sir, but there are separate ballots

for each party and each party essentially holds its primary election and then declines to state also nominate nonpartisan officers, such as county supervisors and then, as was explained, there are usually a proliferation of ballot propositions that we all struggle with, at least twice a year.

Q Mr. Roche, do I not detect a disagreement between your position and that of your opponents so far as participation in the nonpartisan primary leads to disqualification?

MR. ROCHE: That was our position below, Your Honor. I feel that --

Q Is that your position here?

MR. ROCHE: If required to sustain the constitutionality, that would be my position, yes, sir.

Q Did I correctly detect your opponents' position to be the contrary of this?

MR. ROCHE: As I understand it. Unfortunately, the District Court considered the primary a single election. It is difficult to argue any purpose which would be served by excluding those who have voted the nonpartisan ballot at the primary from signing an independent candidate's nomination papers. It is difficult to discern any particularly legitimate state interest or compelling state interest in that regard. But when you get to those who voted at a partisan primary, well, certainly, that is when we have the legitimate and compelling state interests that are being served by excluding them from signing an

independent nominee's papers. These are basically related to the maintenance of party integrity and party organization which had been recognized as compelling state interest. The validity of this type of provision has been upheld in two cases, both of which have been affirmed by this Court, that is Jackson v. Ogilvie, from Illinois, and the Socialist Workers Party v. Rockefeller.

If the Court desires some examples, this is not exactly a party rating statute, though it is somewhat analogous thereto. For example, if we didn't have this restriction, a voter could belong to a particular political party, he could go in and vote against the party's best candidate in the primary and then go and attempt to further his own candidate at the independent nomination stage.

Q Mr. Roche, am I correct that you have five ballots at this primary?

MR. ROCHE: That is correct, Your Honor.

Q And four ballots are party ballots?

MR. ROCHE: Yes, Your Honor.

Q And assuming there is a valid reason for preventing the persons that participate in a party part of the primary, wouldn't that put a restriction on the person that doesn't vote the party?

MR. ROCHE: I know of no reason to restrict it, Your Honor. I mean I have to be candid on that point, and I wish the

District Court had made that distinction.

Q Well, would you want us to strike that down, that part of it?

MR. ROCHE: Well, I would be happy if nothing was struck down, Your Honor.

Q I suppose you are interested in sustaining the judgment that brought you up here? But pursuing Justice Marshall's question a little bit further, is it possible to readily identify the people who have just voted, as Justice Marshall suggested, on some of the other issues but not on any of the --

MR. ROCHE: Oh, yes, Your Honor, there are registration lists posted right outside of the polls, and also the registration books have the registration or whether they declined to state.

Q That would mean checking the petitions against those lists for verification.

MR. ROCHE: Yes.

Q Is that done routinely anyway?

MR. ROCHE: Yes, I would presume so. Actually, I talked to the registrar of voters in Los Angeles County -- and this is not in the record, just off the record -- we were talking about how they did it, and as I understand it their position was that they counted people who voted a nonpartisan ballot at the primary, in other words, they permitted them to sign the

independent nomination papers. It is a matter of construction, I believe, and it is a matter of law. I don't think it would be necessary -- you wouldn't have to overturn the lower court's decision because it is a pure matter of law and it is sustainable under existing California law. We have this one case cited in our brief, Schostag v. Cator I believe is the name of the case, where the court explained that what we called the primary is essentially a series or a group of primaries all at the same time, held by the same election officers, and at the same place.

Q So, you see, you are telling us, do I understand you correctly, you are telling us that despite what the Federal District Court seemed to hold in this case, the California law may be to the contrary?

MR. ROCHE: That's right, Your Honor.

Q Well, then, wouldn't this -- if there is an ambiguity, would this have been an appropriate case fot the District Court to have abstained to get the California law construed by the only courts qualified to do it, and that is the California courts?

MR. ROCHE: Well, Your Honor, I made the argument, it was rejected, and we already have a construction at least --

Q But by a federal court that isn't qualified --

MR. ROCHE: We also have an older construction by the California Supreme Court that the primary is essentially a

number of primaries held at the same time.

Q You mean a construction then contrary to the holding of the District Court in this case?

MR. ROCHE: I think basically.

Q But not really on the point, not on this precise issue, was it?

MR. ROCHE: Not with regard to --

Q I mean, the holding here was, by the District Court, as I understand it at least, that because one of these people had voted as an independent, refused to state, declines to state voter at a so-called primary in which he didn't vote in the party primary, for that very reason he is disable to run as an independent candidate within the 17-month period, and you say that is not the California law. How are we to know? We have no power to construe the California statutes, none at all.

MR. ROCHE: Well, let me put it this way: If the Court feels it necessary to uphold the constitutionality of the independent nomination procedure, I would go for the construction that it is a series of primaries.

Q I am suggesting to you that we, this Court has no power whatsoever to construe the meaning of a California statute. If it is clear, that is one thing, and we accept it. But you and your adversaries seem to disagree as to what the California law is, and that is a disagreement that this Court has absolutely no power to resolve. That is for the California

courts.

MR. ROCHE: Well, it seems to me that the California courts, though not in this context, have sufficiently construed it so that this Court could follow California law.

Q But the three-judge District Court in this case didn't so understand it. It said very, very clearly on III of the jurisdictional statement in the appendix, "Storer will be barred from independent candidacy if he carried out his stated intention of voting on nonpartisan matters in the June primary."

MR. ROCHE: Well, that is how they construed it, yes, sir.

Q Is there any point made that the three-judge District Court in this case that it should defer, should abstain from reaching the constitutional issues here, pending a determination of what the California law is by the California courts?

MR. ROCHE: No, Your Honor. This is the normal situation we find ourselves in, where we find ourselves for a good portion of the time in the Federal District Courts and the courts may at this juncture be more prone to abstention, but in the past it seems to me they haven't been.

Q Well, it is about three weeks before the elction, too.

MR. ROCHE: That's right, Your Honor. They had to get a decision out awfully fast.

Q If I might back up a minute, I am intrigued about

these five ballots. The four-party was in the independent one. How could that independent one be called a primary?

MR. ROCHE: Pardon?

Q The independent ballot at the "primary election"--

MR. ROCHE: You see, we also have nominations for nonpartisan officers, and if a nonpartisan -- a number of people will file nomination papers, for example, for county supervisor, district attorney, or other county officers, and if they receive a majority of the votes cast at the primary they will be elected and the primary is then transmuted into the general election and they are declared elected.

Q That is my problem. How does that become a primary?

MR. ROCHE: Because if nobody receives a majority of the votes cast, then there will be a run-off election at the general election, so it is also a nominating of election for --

Q Well, are there primary ballots for independents that don't have any candidates on, that just have propositions on them?

MR. ROCHE: Not that I -- not what we would normally consider the primary election, because at least in general all counties, the county --

Q Well, would you think it would be valid for the State of California to say that anybody that votes in a bond election cannot run for office?

MR. ROCHE: No.

Q There is not much difference, is there?

MR. ROCHE: No, not much difference, Your Honor.

Q Mr. Roche, let me ask you a question, going on. I am having some conceptual difficulty. As I remember Williams v. Rhodes, this Court approached it on a standard of totality of the circumstances.

MR. ROCHE: Yes, Your Honor.

Q And as I remember the Jenness case, we did no such thing, we approached it on provision by provision separately. Do you think those cases are reconcilable in theory and, if not, which path we should follow here? I ask this because you have been taking provision by provision as you have gone along.

MR. ROCHE: Oh. Well, my basic position is that we should examine California law in its totality as we have done in Williams v. Rhodes and Jenness v. Forston, and that --

Q I think it wasn't done in Jenness v. Forston.

MR. ROCHE: As I read it, it was, because --

Q Well, it doesn't make any difference. In any event, here you are arguing totality --

MR. ROCHE: My recollection was that the Court examined the totality of the Georgia election laws and then showed that they all lead to various alternative routes to the ballot, the same as we say in California, we have all these various

alternative routes to the ballot also. So that we just don't isolate one and say, well, that one is unconstitutional. What we do is we look at California's law in its totality and determine whether or not the law totally, as a package, satisfies an individual's constitutional rights to run for office and voters' rights to vote for them.

Q Well, if we do that, then why is it necessary to argue as you are arguing now, to take up each provision separately?

MR. ROCHE: Because if any of these particular provisions should be considered onerous, we feel that we should be able to isolate the unconstitutional from the constitutional and sever whatever provision the Court might feel is unconstitutional as the California Legislature would want under the severability clause of our elections code.

For example, the Court has clearly approved five percent requirements or less, but maybe the Court might feel that the time requirement is a little too stringent, or they might not agree with another provision with regard to who may or may not sign the petitions. But what I am doing is showing that even assuming we have to look at the independent nomination procedure in the vacuum that its provisions further compelling state interests.

All right. As to section 6830(c) and (d) as they applied to the candidates themselves, that is the one where a

candidate cannot run as an independent candidate if he has voted or if he has been affiliated with a qualified party for one year, the basic thrust of these requirements are also to preserve the integrity of our party system.

Now, they are part of a package in California which insures at the primary stage that party rating does not occur. There is a similar one-year provision as to candidates changing between parties, in section 6401, and if you add that up, it turns out to be more than a 17-month provision for them to switch parties and run in another party. And so by a parity of reasoning, we are not arguing that these provisions are to prevent party rating but they are analogous thereto. We feel that these party rating statutes, for example, in Lippitt v. Cipollone, there was a four-year restriction as to a candidate. Well, that is basically an objective test, and what we are saying here is we have basically a one-year objective test to show that the person is truly an independent and isn't striking off on his own as a disgruntled member of a party to splinter the party up at the general election stage, or you could have a whole series of people striking out on their own and the party system would just disintegrate if that were permitted. And the cases such as those relied upon by the appellants are not in point because they -- such as Yale v. Curvin, and they were cases involving restrictions as to voters.

Q Is there really a problem, Mr. Roche, of

Republicans and Democrats desiring to vote as independents in order to nominate the weakest independent candidates, so that the Republican or Democratic candidate might triumph at the general election? Isn't that how the analogy would go if you are talking in terms of party rating?

MR. ROCHE: That is how the analogy would be, yes, Your Honor, but then there would also be, as I said, the possibility of a large segment of a party being disappointed with the nominee and say, okay, well, let's get candidate X and we will run him as an independent and we will show them.

Q That is a good argument as to the prohibition against those who have voted in a party primary not nominating an independent, but I take it isn't a very good argument as to those who have voted nonpartisan not voting independent.

MR. ROCHE: No, unfortunately.

Q And then seek to sign a petition for an independent candidate, have they something like the equivalent of two votes in the process?

MR. ROCHE: That is correct, Your Honor, and that is the case, as I pointed out, the idea is that if they could do what they virtually had was two choices for office.

Q There is no reason why not let a man vote in the Republican primary first and the Democratic primary at the same time. Is that analogy --

MR. ROCHE: Yes, Your Honor, that is very analogous.

Now, with regard to the 24-day requirement, this serves the compelling state interest of letting the people know who the party candidates are beforehand, and it insures that current attitudes of the voters are reflected in the petition, and it permits voters to know ahead of time what the party platforms are, because the party platforms in California are not put together until sometime in August.

Now, as was pointed out, an independent did actually run in 1972 for assembly in Los Angeles -- my time is up.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Halvonik?

REBUTTAL ARGUMENT OF PAUL N. HALVONIK, ESQ.,

ON BEHALF OF APPELLANTS, THOMAS TONE STORER, ET AL.

Q Mr. Halvonik, what about that proposition, the hypothetical question I put. If a man has gone in and voted in the Republican primary, let us say, and then he is dissatisfied with the results of that primary, on your theory he should be permitted to vote and to sign a petition for an independent?

MR. HALVONIK: Well, there are two things going on here though. The independent can't start circulating his petition until late August, while the primary occurred in June, so that in order to get five percent of the electorate to hang around, you have got to convince them not to get involved back in that process at all. If California had a system which gave

the independents an equal crack at the same time --

Q My question is do you think they should have two bites at it, to vote in the primary of the Democrats or the Republicans and then in effect get a "vote" by having his signature on the petition function the same as a vote in a primary?

MR. HALVONIK: Well, I don't think it is unconstitutional to have such a system, and Georgia has that system, but I don't want to --

Q Well, do you think that is unconstitutional?

MR. HALVONIK: -- require them to make a choice. I think it is unconstitutional to give the parties the advantage of --

Q You are suggesting it is unconstitutional, are you not, to fail to allow that, that is if California does not allow a man to vote in the Republican primary and then when he doesn't like the results sign a petition for an independent candidate, you are saying that is a violation of some constitutional law.

MR. HALVONIK: It is a violation because they won't let the independent compete at the time of the primary. If they are not going to let the independent compete at that time for that vote, then they can't very well say he is getting two bites at the apple. If they want to let the independent compete at the same time --

Q Is there anything to prevent the independents from saying that "we are going to have a convention of independents on the day of the primary, and don't go to the Republican, don't go to the general primary but come to our convention and sign a pledge card that you will sign a petition --

MR. HALVONIK: That is all very well if independents were in fact like a political party, but they are not, there are different kinds of people who are independents. Mr. Frommhagen doesn't get along with Mr. Hall at all, and he is not going to get together with him at a convention. The idea of the independent is that they are not organized. If somebody wants to be an independent candidate, his supporters have an equal opportunity to canvas and solicit people to sign nominating petitions at the time when these other people have the opportunity to have them go to the polls in the primaries, then I would say you could make a distinction and say you have got to make a choice.

Q I am not --

MR. HALVONIK: But what happens in California is the man can't even circulate petitions until two months after the primary, so he is completely taken out of that arena at the time when the voters are most thinking about the issues. The parties are given this tremendous advantage, and it is argued that that gives people, oh, make sure that they reflect current attitudes. Well, the parties don't reflect any current attitudes, it has

been two years since an election in which they are relying to stay on the ballot, and yet an independent can't appear in January or February and start soliciting signatures for his candidacy. By then that independent fairly well knows what the main issues are going to be in the following year, and maybe that independent doesn't care who the candidates are. Maybe that independent, like Tom Storer, just doesn't feel the political parties at the moment are properly representing the people, that they are too much dominated by interests who he thinks are innimical to the benefit of the people in Marin County. He doesn't want to form a political party, he doesn't care what happens in Orange County, at least he doesn't care any more than he cares what happens in Klamath County up in Oregon. He is interested in Marin County, that is where he wants to run. We have a Congressman in the district below him, McCloskey, who would like to run as an independent, he is a Member of Congress and could win as an independent, most political experts think, but maybe he can't get through a Republican primary.

Q Did I understand you, that this man doesn't want a party, doesn't want any backing?

MR. HALVONIK: Doesn't want any backing --

Q Doesn't he want to get elected?

MR. HALVONIK: Pardon?

Q Doesn't he want to get elected?

MR. HALVONIK: Yes, he wants to get elected.

Q Without any backing?

MR. HALVONIK: Well, without a political party's backing.

Q Well, if he gets backing, won't there be a party?

MR. HALVONIK: Well, it won't be a party under the terms that he conceives of a party, if he gets a group of people behind him to support him that are not connected with an on-going institutional group tied to particular interests, he feels he can win. He doesn't want to be tied to those interests, he would rather lose, but it is not a gesture candidacy, he is a genuine candidate, as Mr. McCloskey would be running as an independent, and McCloskey would probably win. For sure, it is very likely he would win in his district, because it is Democratic district, in which he has won as a Republican constantly.

I wonder if I could just briskly on a couple of other points. Mr. Justice Rehnquist asked whether Lippitt was not inconsistent with our position that requiring you not to have been a member of a party for a year and a half violated Article I, section 2. The issue was never raised in Lippitt. There is another distinction in Lippitt in that we were talking there about a party primary, so we don't know in Lippitt, at least from what occurs in the lower court opinion, whether that person was absolutely foreclosed from appearing on the general

election ballot, or just foreclosed from appearing as a Democratic nominee.

But here we have somebody absolutely foreclosed because he belongs to a class from which he can't escape.

Q Well, of course, your argument of Article I, section 2 isn't absolute foreclosure, it is burdening or increasing, and it seems to me they are the same on that point, whether you might reach a different result because of the foreclosure argument or not.

MR. HALVONIK: Well, what I am saying, in Lippitt the issue was raised essentially as an equal protection one, and you can go into all kinds of balances at that point. But Article I, section 2 doesn't allow for balance, if it is a qualification then the states can't add it, and that issue wasn't raised in Lippitt, and cases do not stand for propositions that weren't raised. I think that goes for Lippitt, it goes for Miner v. Happisset, which is sort of the dread scot of women's liberation. That did not involve the equal protection clause which is the principal clause we rely on. That is a privileges and immunities case. So that case, which seems to be the only one to suggest that voting is not a constitutional right protected at least in congressional elections, that case doesn't go to the principal issue.

On that point, Justice Marshall raised the question about whether Classic involved the right of a candidate to run

for office. It is on page 309 of 313 U.S. It says they were charged with interfering with the free exercise of the right of candidates to run for the office of Congressman, and to have --

Q And to have the votes counted.

MR. HALVONIK: Right.

Q But there was more than one running for office in that case.

MR. HALVONIK: No, it was a group -- it was a section 1920 case, it was a criminal prosecution for people interfering with the rights of those candidates to run for office.

Q No, no, right of the people to vote.

MR. HALVONIK: Well, I would say, Your Honor, at page 308 it is the right of the candidates to run for office.

Q I just read the whole case, for the fourteenth time.

MR. HALVONIK: Let me move to abstention just for a moment. It wasn't raised below. Their response was filed on August 18, and not three weeks before the election, in August they filed their response and did not raise the abstention issue.

Q That was after the election, wasn't it?

MR. HALVONIK: No, it was August 18, 1972.

Q Well, the election was in November?

MR. HALVONIK: Yes.

Q So this was directed not at the primary but -- not to getting on the ballot in the primary but to get on in the general?

MR. HALVONIK: It was filed before the primary election, the answer was filed in August, and we had the preliminary hearing on preliminary injunction on August 31.

Q Mr. Halvonik, regardless of whether or not that abstention was raised below, doesn't it appear here, as was disclosed by my Brother Blackmun, that there is an argument between you and your brothers on the other side as to what the California law is? At least with respect to the man who voted, refused -- what do you call him -- declines to state --

MR. HALVONIK: Declines to state.

Q -- declines to state in a primary as to his eligibility to run as a candidate?

MR. HALVONIK: I don't really --

Q And you seem to disagree as to what the California law is, and as you well know, that is a questionwe cannot resolve. We have no power to.

MR. HALVONIK: When I brought the case, I had to assume that the language in the code section meant what it said, and I had to attack that section. And then Mr. Roche came in and found that he couldn't come up with any justification for that section and says it doesn't mean that, and I said that is fine with me, let's not argue about it. However, the District

Court ignored the concession and so here we are.

Q I know.

MR. HALVONIK: Now, it seems to me that if you interpret it in any way other -- if you interpret it the way the District Court interprets it, it is clearly unconstitutional. Nobody can come up with a justification for it. It seems to me that if the state tells you that it ought to be interpreted the other way, you don't have any real problem of abstention.

Q I don't know what your California law is in this respect, but I would guess maybe that Mr. Roche is hardly authorized to tell us that a statute means something other than what it appears to say.

MR. HALVONIK: Well, I suppose the only answer is that if, as I contend, that it is clearly unconstitutional, is to hold it unconstitutional and if the state court wants to say you made an error in the way you read it, it can do that and revive it.

Q Well, that is not the only alternative. Another alternative would be to remand the case to get an authoritated construction from the California courts as to --

MR. HALVONIK: Well, one difficulty with that is that we didn't file the suit three weeks before the elction. The fact of the matter is we have got another election coming up in 1974, now if we go back and we abstain and we have got to go to the Superior Court of California and appeal that to the Court of

Appeals, effectively we are talking about a couple of more years of litigation, and we are talking about a very fundamental right here, and I don't know that when you are talking in this election context about the very fundamental rights that if the states come up with an ambiguity -- I don't agree that it is an ambiguity, but if the state wants to create an ambiguity by saying that is not what we meant, I don't think they can by that ploy force us past another election without knowing whether we can run on a ground somewhat equivalent with the parties, you know, some sort of parity, people who are not affiliated with a political party, so that they are not invidiously discriminated against.

MR. CHIEF JUSTICE BURGER: I think your time is up, Mr. Halvonik.

MR. HALVONIK: It is indeed. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:37 o'clock p.m., the case was submitted.]

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