LIBRARY
SUPREME COURT, U. S.
C.2

In the

Supreme Court of the United States

AMERICAN PARTY OF TEXAS, ET AL., Appellants, vs MARK WHITE, JR., SECRETARY OF STATE OF TEXAS, Appellee.	)	No. 72-887
ROBERT HAINSWORTH, ppellant, vs MARK WHITE, JR., SECRETARY OF STATE OF TEXAS Appellee.	)	No. 72-942

Washington, D.C.

November 5, 1973

Pages 1 thru 48

Duplication or copying of this transcript by photographic, electrostatic or other facsimile means is prohibited under the order form agreement.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE
NOV 13 3 43 PM '73

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

AMERICAN PARTY OF TEXAS ET AL., Appellants, v. MARK WHITE, JR., SECRETARY OF STATE OF TEXAS Appellee.	No. 72-887
and	
ROBERT HAINSWORTH, Appellant, v. MARK WHITE, JR., SECRETARY OF STATE OF TEXAS Appellee.	No. 72-942

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

The above-mentioned matter came on for argument at 1:38 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWARD, 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:

MRS. GLORIA T. SVANAS, 418 West Fourth Street, Odessa, Texas; for appellants in No. 72-887;

ROBERT W. HAINSWORTH, 3710 Holman Avenue, Houston, Texas; for appellant in No. 72-942, pro se;

JOHN L. HILL, Attorney General of Texas, Austin, Texas; for appellee in both cases.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-887, American Party of Texas, et al, v. Bob Bullock, Secretary of State of Texas.

Mrs. Svanas, you may proceed whenever you are ready.

ORAL ARGUMENT OF GLORIA TANNER SVANAS, ESQ.,

ON BEHALF OF THE APPELLANTS

MRS. SVANAS: Mr. Chief Justice and members of the Court: I am Gloria Svanas, representing the Appellants in this case, the minority parties in Texas, THE AMERICAN PARTY OF TEXAS, THE SOCIALIST WORKERS PARTY OF TEXAS, and THE TEXAS NEW PARTY; also representing the independent candidate, Laurel Dunn, who was a candidate for the United States Congress.

This is a direct appeal from a 3-Judge Federal Court in the Western District of Texas, finding certain sections of the Texas Election Code to be constitutional.

It is the contention of the Appellants, these minority parties, that the Texas Election Code is precisely drawn to accomplish the goal that is intended to accomplish: that is, the purposeful and invidious discrimination against minor parties and independent candidates. The Legislature in Texas arbitrarily and capriciously controls elections in Texas.

It has been said that there are four alternative routes to ballot position in Texas. It is urged by the Appellants that there, rather, there are four exclusionary routes

from the ballot in Texas. The first exclusion is based on a difference of opinion with political philosophy. You either join up with the Republican and Democratic parties in Texas or you are actually excluded -- practically excluded -- from the ballot. You either adopt the political philosophy of the two major parties, or you surrender your First Amendment freedoms which allow you to practice the philosophy which you believe, and to associate and organize political parties for that purpose.

Once you have participated in the Party Primary you are locked in to that particular party. Actually, voting in a Party Primary constitutes registration in the State of Texas, not only from the standpoint of our continuous registration, which we now have, but also from party affiliation. Only through participation in the major political parties are you allowed the privilege of absentee voting. Otherwise, you are completely excluded from absentee voting, and if you should desire to go fishing on election day, or should you, by any other reason, be prevented from participating at the ballot box, you will go to the County Clerk's office in Texas and be compelled to either vote Republican or Democrat or forfeit your right to vote.

Q Do you know of any other state that has such a provision as to absentee ballots being restricted to one or two parties?

MRS. SVANAS: No, sir, I have not found one. I found one particular case this Court had decided in McDonald from the Illinois case, but in that one the absentee privileges were restricted to those who were confined in institutions, even though they may just have been under charges and had not been convicted. I find it a little bit harsh to compare the minority parties in Texas to the inmates of penal institutions in other states.

The added bonus which we have in Texas since the 1971 McKool-Stroud Primary Financing Law, which is also part of this appeal, is the fact that if you participate in the Republican and the Democrat Primary you get the bonus of having a tax-paid-for Primary. If, on contrast, if you should determine to participate with one of the minority parties, then you are compelled to pay all of these expenses out of the minority party account.

There are no write-ins in the Primaries in Texas since the original time of the rise of the Republican Party in Texas, which used to nominate by write-ins in the Primaries, so they excluded write-ins from Primaries when that party started growing up.

Actually, the nomination for local offices in Texas by the Democrat Primary, as a practical exercise, is determative participation because nomination for most offices in

Texas by the Democrat Primary is tatamount to election.

The second exclusion from the ballot in Texas is by the numbers of the votes for Governor which were cast for the candidate of that particular political party in the last gubernatorial or general election. For instance, the American Party, in 1968, polled 584,000 votes for its nominee for United States President, but because the American Party did not have a nominee on the ballot for Governor it was automatically excluded from the ballot from that time. The question is, is the numbers of vote gained insofar as the gubernatorial candidate concerned a fair competition, and does that fair competition constitute a compelling State interest?

We need not speculate what might have happened to our requirement for vote because of what actually did happen in Texas after the RAZA UNIDA candidate secured the necessary signatures and obtained ballot position in the 1972 Primary. They polled more than 2 percent of their vote for their gubernatorial candidate in 1972, and, consequently, they -- the Texas Legislature, in meeting in its next biennial session, raised the quota from 2 percent to 20 percent for automatic ballot position from this State. And so the numbers game does prevail in Texas, and if one minority party happens to fulfill the requirements of that then law, then they'll change the law again. And, actually, that was the difference that was made

in the law in this 13.45 (2) after the 1968 campaign, when the AMERICAN PARTY started to rear its head as a competitive factor in Texas. And so the law was changed, and so we got these onerous petitions which we are now required to circulate.

This is the basis of the third exclusion from the ballot in Texas. If the gubernatorial candidate did not receive 2 percent of the vote, which has now been raised to 20 percent of the vote, in the last general election, you have to go out and start the petition route again. Of course, this presumes that you had a gubernatorial candidate. It would also include new parties, like the TEXAS NEW PARTY and the TEXAS SOCIALIST WORKERS PARTY, which did not have a candidate on the ballot of any kind in 1970, and was not organized on a state-wide basis.

We have a statutorily dictated state-wide organization in Texas for new and minority political parties. Early as November preceeding the General Election we are required to file a notice of intent to nominate by convention. In January, all candidates must file for office on that ballot. By March, the State rules must be filed. In May, the county precinct conventions must be held at the same time as the party primary conventions are being held. And suddenly the whole Texas totalitarian idea takes on the very reflections of Williams v. Rhodes. The petitions which are required in

Texas are statutorily dictated and exacting in wording. The wording must be exactly as it is dictated by the statutes or they are not accepted and filed by the Secretary of State. The form is dictated, the form of the signature.

Prior to the holding of the precinct conventions throughout the 254 counties in Texas in May, there must be printed and circulated these petitions. This is the first step for qualification for ballot position by the numbers game in Texas. They must be circulated, they must be in the hands of the precinct chairmen in each of the precincts so they will be available for signature on that day, because, beginning as of that day, you have a total of 54 days as in 1972 -- there might be 55 days next year -- to secure one percent of the total vote for Governor in the preceeding General Election to sign these petitions to indicate this support for some candidate who might be running on this minority party ticket. This number in 1972 was some 22,000 plus signatures; in 1974, will be 36,000 plus signatures.

But these petitions not only must be in this exact form, but they must be signed before a notary public, and they carry a criminal penalty that you must have -- you must swear that you have not participated in any of the other party primaries in any way whatsoever. You have already been excluded from the absentee balloting, and it is the contention of the minority parties, hereon appealed, that certainly if

you are to put out a petition after the primary, we should also be accorded the right to compete for those absentee votes. And there are many thousands of absentee votes cast in Texas in each election.

Q Mrs. Svanas, you referred to a candidate for the Presidency of the United States on what you call a minority party. Was that the American Party?

MRS. SVANAS: Yes, sir, it was.

Q And that was in 1968?

MRS. SVANAS: Yes, sir, it was.

Q Was that party on the ballot, as such?

MRS. SVANAS: We were on the ballot from the standpoint only of the Presidential candidate -- yes, sir. But, see, after the 1968 election, when the American Party did poll 584,000 votes --

Q For your Presidential candidate...

MRS. SVANAS: Yes, sir, for the Presidential candidate --

Q You had no gubernatorial candidate?

MRS. SVANAS: That's right. But not only at that time, it was a very simple matter. 13.45 (2) was changed in 1969 to meet that competitive threat of 1968, to assure that it would be very difficult to make the ballot in 1970 and '72; and that's were we came up with our petition requirement in Texas. But in 1968, it was a simple matter, by com-

parison, for a minority party to get on the ballot, and that was the method that was followed by the American Party to secure ballot position.

Q But since that time the law has been --

MRS. SVANAS: Yes, sir, it has been changed.

Q -- changed, making it more difficult for --

MRS. SVANAS: Much more difficult, sir.

Q -- this party to get on.

MRS. SVANAS: And, actually, the Legislature in Texas meets every two years, and it seems that the Election Code changes every two years to meet the threat of the minority party, or the independent or the competing party, just as the change has been made. Now, the 1972 McKool-Stroud Act for the purpose of State financing of party primaries was a one-year statute, and it was thought that the 1972 Legislature would change the election laws to provide for the whole new primary election procedure. But since they did not do so, they did have to pass another financing bill, which is the Senate Bill 11, which has been filed by the American Party as a Supplemental Appendix. And they provided in that, apparently to pay for the major party primaries in 1974, but just happened to incidentally change 13.45 (2) again, to require that to maintain ballot position after 1974, that the party would have to poll 20 percent of the votes for Governor. Of course, it's forseeable that this could result in active cam-

paigning by those who are now on the ballot to the point that some one of the three might even be excluded.

The fourth exclusion from the ballot is probably what is recognized in Texas as the least competition to the major parties, and that is the exclusion of the independents and the non-partisan candidates. It is the contention of Mr. Laurel Dunn, who was the candidate for United States Congress, that the requirement of the petition, in addition to the United States Constitutional specified qualifications for United States Congress, is actually the super-added idea -- the petitions are super-added to the qualifications, as was distinguished by the KENT'S COMMENTARIES ON CONSTITUTIONAL LAW. This, of course, is the Powell v. McCormick suit which earlier had been decided as to Powell's additional qualifications, or attempt to exclude him from the House of Representatives.

It is the contention of the Appellants that the statutory exclusions from the ballot in Texas result in constitutional, unjustifiable inequities. We don't believe that there is anything in the record, whatsoever, by which the State of Texas even attempts to justify these exclusions. Where is the compelling State interest for the deviations from these constitutional guarantees that any voter can effectively participate in the election for the candidate of his choice, as compared to being compelled to participate

in either of the two major parties. The size of the ballot falls on deaf ears when we realize the numbers of the candidates who each year file in the Republican and Democrat Primaries for the office of Governor and the other controlling offices in Texas. This is particularly true since this Court has overturned the filing fees requirement in the State of Texas.

Q Mrs. Svanas, to come back a minute to the party conventions which you mentioned. I think, as I recall, in Article 13.47, it states that party conventions shall be held in precincts, county and state.

MRS. SVANAS: Yes, sir.

Q Now, is that construed literally to require that a precinct convention be held in every precinct in the State of Texas?

MRS. SVANAS: Yes, sir. It is not required to be held, but if we are to secure the signatures, as are required, then the ballots -- the petitions, pardon me -- must be distributed to each of these precincts, and begun at that level. The requirement becomes more obvious if one desires to participate in the primary in that the attendance at the county convention is limited to those who attended the precinct convention, not to those who have signed the petition. And then the attendance at the state convention, which nominates on the state-wide level, is limited to those who attended the

county convention, which, of course, has been limited by the precinct. So, actually, to have any voice in the minor political party in Texas, it is necessary that you attend the precinct conventions and make your voice heard there so you can attend on up the row. And it's this continuous requirements by statute of what we must do that makes it practically impossible to attain ballot position in Texas.

Q If conventions are not held in every precinct, or in every county, does that disqualify the individual, or the party?

MRS. SVANAS: It does not disqualify the party, but it does disqualify the individual, because of his lack of participation there is no way for his to go back and become a participant, that is, in the nomination for the county and the stat-wide offices. It is to be noted from the record that the Republican did not even hold party primaries in every county in Texas, since we do have so many counties, and some of them don't indicate any interest in the Republican Party. So those particular persons, if they did not participate in the Democrat Primary, and there was no offering of a precinct convention by the American Party, then they were totally without a vote in Texas in 1972.

Thank you.

Q Mrs. Svanas, let me ask you one question. Explain to me this 5 percent bonus for the County Clerk under

the Financing Law.

MRS. SVANAS: That's the county -- that's the party county chairman, Mr. Justice. The State law in Texas provides under the McKool-Stroud Act and under the new, recently passed Primary Financing Law, that the county chairmen of the major political parties, which this year will include RAZA UNIDA because they did qualify by the 2 percent vote in 1972 -- they will determine how much it is going to cost them to hold a primary in each county in Texas, and they will report that amount to the Secretary of State.

Then they -- after the primary has been held, and the run-off primary, then they will report the actual amount spent, and based on the actual amount spent, each county chairman in Texas is allowed to claim a 5 percent bonus himself for his participation in the major party primaries.

Q Very well, Mrs. Svanas.

MR. CHIEF JUSTICE BURGER: Mr. Hainsworth?

ORAL ARGUMENT OF ROBERT W. HAINSWORTH, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. HAINSWORTH: Mr. Chief Justice, and may it please the Court: I am here today to speak in behalf of the Appellant Hainsworth, and also in behalf of those others who have endeavored to become independent candidates in the State of Texas over the years, and have not quite been able to make it.

To become an independent candidate in Texas, one has to meet the requirements of Article 13.50 of the Texas Election Code, which provides, among other things, that the candidate must obtain a certain percentage of the votes of a certain number of the people who cast a ballot for Governors, both Democratic and Republican, at the last preceeding general election. In addition to that, if the candidate is from a one-county district, he has to get 5 percent. If the candidate is from a district composed of one or more counties, then the candidate is only required to get 3 percent of the vote. So there is some variance, even with respect to candidates, depending upon the number of counties in the district.

In addition, the independent candidate has to obtain notarized signatures from each signer of his application. And in addition to that, the independent candidate is proscribed in making his efforts to canvass for signatures in that those who have participated in the first primary, either Democratic or Republican, and those who have voted in the second primary -- or run-off primary -- are not eligible to be canvassed by the independent candidate for that particular office, provided anybody has been a candidate in those primaries -- those two primaries.

That, in effect, limits the independent candidate to about 50 percent of the voters in his district. Now, the appellant in this case was a candidate for State Representative

in District 24 -- District 28 86. And this particular county is a single-member district. And there are approximately 23 to 24 single-member districts in Harris County, Texas. There are approximately 74-75,000 people in each state representative district, and it is difficult to beat those requirements of the State statute, Article 13.50, in order to qualify as an independent candidate.

In addition, another difficulty is the requirement that you must get those signatures within 30 days -- 30 days after the close of second primary day, which usually comes about 3rd of July. It did in 1972.

The 3-Judge District Court, in deciding the consolidated cases, stated in its opinion that these consolidated cases fell in between Williams v. Rhodes and Jenness v. Fortson, in that the Supreme Court, in the Williams case, was working on one end of the spectrum, and in the Fortson case they were working on the other; and that the facts in these consolidated cases now before the Court fell exactly in between.

However, it seemed to me that the Jenness case was the one that the 3-Judge District Court should have applied in making its decision. Because, in that particular case are laid down some rules, or possibly it may be stated that the State of Georgia had set forth the requirements that it considered appropriate for independent candidates, and it

may be that they were very, very liberal. But it seems to me that they were very, very fair, and I would like to submit to the Court that they should give consideration, serious consideration, to following the Jenness case in its requirements insofar as independent candidates are concerned. In that particular case, no notary public was required, in that particular State, insofar as an independent candidate was concerned in getting on the ballot.

Q Well, what's involved in getting a notarized signature?

MR. HAINSWORTH: The matter is one of expense, for one thing. And another is the matter of --

Q How much does it cost?

MR. HAINSWORTH: Well, the notary public fee, by State statute in Texas, is 50 cents for each notarization. However, when you have to go out -- whenever a notary public goes out of his office to notarize something, it always costs more. And, of course, if you are an independent candidate, or trying to become an independent candidate, you've got to get a notary public who will go around with you and walk and walk, and notarize as necessary, whenever you can get somebody who is willing to sign your application. And it takes a lot of walking, and lots of people who are employed will not walk for a dollar a signature. They may want even more. Then those you get are maybe the kind of people who are not able to keep

up, so you are kind of hampered. It puts a burden upon independent candidate --

Q What formality does the notary public have to follow?

MR. HAINSWORTH: Well, there is an oath prescribed by State statute which says something like this: "I solemnly swear that I have not participated in any primary, first or second, held this year to nominate a candidate for the office for which I desire John Jones, an independent candidate, to be a candidate for." And so on. That is, in substance, what's in the oath.

Q The notary have to execute any formal return -- ?

MR. HAINSWORTH: Well, this is what the application is drawn up, so that it can be for each individual signer, or it can be drawn up so that ten, fifteen or twenty persons can sign the same application. But in each instance, the notary public has to appear -- the person has to appear before the notary public and have him to swear that he is stating the truth. And, of course, that kind of limits some people, because people somewhat don't like to make an oath. They are kind of reluctant. So that kind of deters some individuals from taking the oath, and that takes away from the applicant in getting signatures.

Q As a practical matter, don't they usually get petitions by sending a notary public out to get them, or at

least have the notary public go out with the party worker?

MR. HAINSWORTH: Well now, of course, we are dealing with an independent candidate. And usually an independent candidate is working alone.

Q Well --

MR. HAINSWORTH: And he is trying to get somebody to help him, and he is not able to get --

Q Most independent --

MR. HAINSWORTH: -- anybody to go out for him, and stay there, too.

Q Most independent candidates have some friends, or they aren't likely to get many votes. Isn't that a practical reality?

MR. HAINSWORTH: Well, I think this, Your Honor, the friendship comes when the independent candidate himself goes, and speaks with the individual, and the individual will readily sign. I think that is the kind of friendship --

Q If you carry that to its logical conclusions, then you would object to the requirement of getting any signatures at all, because that takes work.

MR. HAINSWORTH: Well, no, sir, I would not object to that.

Q Your objection, then, just goes to the degree --

MR. HAINSWORTH: Well, it goes to the notarization. And, of course now, if it wasn't for the notarization I could

go out myself and get 500 signatures, without any hesitancy. But when I have to take a notary public along, and if I can walk faster than the notary public, and I've got to wait until he catches up, and I've got to go to those, and let him know that these won't sign, I've got to keep going -- well, I can work all day, and I may get 15.

And that's the way it goes. But now that, in itself, the notarization would be all right if you had, say, 90 days, or 60 days, but you only have 30 days. So they cut you both ways. If the notarization provision is there, and if I could work, or any independent candidate could work, 60 days, he could get the 500 signatures. But when you have to have them notarized, you're only limited to 30 days, and then you are excluded from those who voted in the Democratic and Republican primaries -- well, you're cut so far down, and you don't know who to go to -- you have to go from house to house, and may have voted, and they say, "Well, I would sign, but I voted already..." So, there's lots of handicaps and burdens that you have to undergo in order to try and qualify. Of course, it's not impossible.

In fact, if I had been able to have forseen the many months of work that I would have had to have undergone to get here, I believe I would work night and day to have made it. And I think I would have saved some time.

However, I am hoping that my appearance here will

serve to make the Court aware of the problems of an independent candidate, in that an independent candidate is striving to help make the country stronger. And when an independent candidate goes out for a small office, he does not expect to wield great influence. It's just a matter of trying to champion some idea of government that he has. And if it meets with the approval of the people, and he is able to get elected, fine.

Of course, when an independent candidate gets on the general election ballot, he still has the Democratic Party and the Republican Party to defeat. And he's strictly an underdog. He's got a hard fight on his hands, and he gets no funding, or no financing, like the Democratic Party does. It's all coming out of his pocket. And a lot of times the Democratic Party candidate, or the Republican Party candidate, don't have any opposition.

Once they get the nomination, which in many cases is tatamount to election, well, they're in. They don't have any -- any general election opposition. So all they have to do is struggle to get on the primary ballot, as the nominee. And then they're just about in. But lots of times the -- we may have an opposition candidate in the primary and none in the general election, and then they may not have even a opposition candidate in the primary. Sometimes it's just a shoo-in. And, of course, it all depends upon what the office

is that the candidate is running for.

Now, I hope to reserve 5 minutes for a rebuttal if I may. I don't know whether I've gone over or not.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Hill?

ORAL ARGUMENT OF JOHN L. HILL, ESQ.,

ON BEHALF OF APPELLEES

MR. HILL: Mr. Chief Justice, and may it please the Court: I want to first thank Mrs. Svanas for filing an Appendix with this Honorable Court, in which she very promptly, after the Governor signed Senate Bill 11, filed that as an Appendix with the Court, saving us the trouble of doing this. I think it speaks very clearly for itself, and we have not elaborated by any additional brief with reference to it.

The second thing I would like to say that, particularly after listening to him, although I'd known him in Houston, that our Texas admires independent candidates, and we want people like Mr. Hainsworth to stand, if they desire, as independent candidates; and I think our laws have accordingly allowed that.

I need to speak, if I might, for a moment factually to the American Party's situation. This party, of course, was a very viable political force in 1968 in our State, with over 91,000 signed up members, and they cast 584,269 votes for George Wallace for President.

Now, since the American Party elected not, for reasons of their own, to field a Governor nominee in the 1968 general election, that party, in 1970, was required under our statute to nominate candidates for State and local offices for the general election by conventions. And, when the party did not file with Mark White, whom I represent -- our Secretary of State -- sufficient certification to indicate the minimum support that our statutes covering these matters contemplate -- something in the neighborhood of 22,000 conventioneers -- or, if that many people don't get to the convention, we permit supplementation by petition, which we regard as a helping hand, not as a deterrent. An add-on, an addition.

For reasons that I frankly don't know, nor understand, and the record is silent on it, they just simply had 6,828 names. And whether they were -- that was because of their tremendous -- and the Court can take judicial knowledge of their great participation in the Democratic Party -- or not -- I do not know. But those are the facts.

Now, the New Party, on the other hand, which represents truly just what it is, a new party, a Texas new party. We don't know very much about it. We're not told very much about it. This Court is not told much about it. It made no effort at all, under this record, to have any compliance. And that's where that matter stands.

The Socialist Workers Party did comply with our laws, and they were on the ballot. And they're, while filing a brief here, are not here at least verbalizing that, and I don't know of any substantial complaint they raise.

The Raza Unida, who took no appeal from this matter, and we're a State of many minority parties, today, which is the proof of the pudding. Ran a very fine gentleman for Governor -- he received a very good vote, and they qualified under the 2 percent. And I'll discuss how our procedure works in a little more detail in a moment.

And then, Mr. Laurel Dunn, who was an independent candidate for the United States House of Representatives, and represents himself and the four other independent candidates, made absolutely no attempt to meet the requirements of our statutes, with reference to independent candidates, and simply filed suit shortly after the primary election, which he had a perfect right to do.

Mr. Hainsworth did try, having not obtained, for reasons that I am sure the Court has heard here, and whether that represents inability or what, we can't judge. It's a peculiarly within the -- probably in his mind. But nonetheless, his 328 fell short of the 500, which we believe is not an onerous burden, and one that many have met. He filed suit attacking the constitutionality of these provisions in a very candid and open way that he displayed here before the Court.

Now, we were faced in Texas this last session of the Legislature with this situation: we were faced with Williams, as we could read it and understand it. We were faced with Jenness, as best we could read it and understand what this Honorable Court was saying to the States in this area. We had read Rosario v. Rockefeller. We had here three cases in which this Court, a majority of this Court, had been heavily involved. In addition to that, you had written Bullock v. Carter, arising from our State, involving our financing situation of our filing fees.

If I might, in that context, discuss with you for a moment Senate Bill 11 that is here as an Appendix, which was passed and signed by our Governor on June the 15th of this year. It provides: 1) a schedule of filing fees that we believe are in keeping with the rules of reasonableness permitted by Bullock v. Carter -- much less than before -- much, much less -- not here under attack, and permitting the filing of a candidate of a nominating petition in lieu of the payment of filing fees, which we believe is very progressive, in keeping with Carter v. Bullock, and not here under attack, provides for State --

Q Notarized signatures required?

MR. HILL: Beg pardon?

Q Notarized signatures?

MR. HILL: Yes, sir. Five thousand in a State-wide

race.

Q Notarized.

MR. HILL: Yes, sir. And the notarization, Mr. Chief Justice Marshall, as far as I am aware, has not been under attack in any decisions of which I am familiar; and the only decision in which the matter has been discussed, was -- it was not thought to be a constitutional burden. And, moreover, if I might -- pardon me, Mr. --

Q And that's much less than the Jenness against Georgia requirement, is it?

MR. HILL: Oh yes, sir, much, much. You see, on the Jenness v. Georgia -- if we used Jenness, and this can be considered by a State, trying to speak for our Legislature; but 5 percent of our total electorate in Texas -- and that is Jenness -- it's not 5 percent of a gubernatorial candidate, it's 5 percent of the electorate. I don't know what Mrs. Svanas and others would say that constitutes as of the time relevant to this case -- something over 200,000 signatures. And we would be passing clear constitutional muster. Under Jenness, we just walk in, doff our hats and walk out.

We have elected, not in any effort to hold down minority parties, but we have elected in our State in an effort to have a totally fair system and one that we believe is much preferable to Georgia, and much fairer to Georgia, to have one percent -- one percent --

Q How many --

MR. HILL: -- of gubernatorial, which would be about 22,000, under our -- in other words, we, like a lot of other States, Mr. Justice White, don't vote our folks.

Q But that 22,000 means $11,000.00, doesn't it?

MR. HILL: No, sir. Mr. Justice Marshall, I --

Q Do you agree that it's not 50 cents per signature?

MR. HILL: Well, sir, the practical answer to that, and I realize that we have a Carter problem here, as far as when you get into the question of wealth and cost --

Q That's what I was thinking --

MR. HILL: -- I'm not unmindful of that, but the facts are that notarization is allowed -- and I have the statute open here -- is allowed in bulk on certification, for one thing. It says that the certifying officer may certify the petitions -- if I might just --

"One certificate of the officer before whom the oath is taken may be so made as to apply to all to whom it was administered." The candidate can be a notary. I'm not suggesting that there can't be some cost here, but it's an exaggerated point, in my own judgement.

Q How long does he have?

MR. HILL: He has -- you mean in terms of the independent can- --

Q Well, how long does he have to have to get the 2,200 --

MR. HILL: Well, sir, you see the basic way we --

Q 22,000.

MR. HILL: -- work, Mr. Justice White, is through conventions --

Q Yes?

MR. HILL: -- of minorities' parties. We presume that the convention will be held on the same day that we as Democrats vote, and that the Republicans vote, and all other parties -- that the conventions will be held, and as a result of the convention, the 22,000 people will attend and certify their names. You don't even get into petitions. The only way we get into petitions at all, in Texas, is, we allow it as a supplement to the convention process.

Q Or a substitute.

MR. HILL: It -- no -- well, it could be a total substitute, but our statutes, frankly are written to where it is implied in the statute that you will try to have conventions. Now, for example, the Socialist Workers Party, in qualifying --

Q I thought your opponents argued they were strictly limited in time in getting these --

MR. HILL: They have 55 days --

Q To do what?

MR. HILL: -- if -- well, let me get this exactly,

because the Socialist Worker Party, for example, got all of their petitions by conventions in Harris County. You don't have to have precinct conventions all over our State. In fact, it would be kind of ridiculous to try. You are not required, by law, to do it. You can have the conventions wherever you elect to have those conventions.

When you go to your conventions, a minority party -- and the only ones in our State that are a minority party are those that didn't poll over 2 percent of the gubernatorial vote in the preceeding general election. So we don't have a very harsh rule of threshold to begin with. But when they go under that rule, and they come to these convention processes, it's anticipated. And they can go out all the time our elections are going on and say, "Don't vote in that Democratic Primary. I want you to come to our convention. We're going to have it the same day."

Q All right, you can supply the names by certifying that those who attend you convention --

MR. HILL: Yes, sir.

Q -- or in 55 days between then and the election, I guess --

MR. HILL: No, sir. It works this way. In early May, we have our --

Q My mistake.

MR. HILL: -- first Democratic Primary, or our first

primaries. On that same day, minority parties who are under the 2 percent or less rule, have their conventions, any time from seven to seven. When they go into those conventions, if they produce -- and they can have them in one county, 50 counties, 30 counties -- wherever they want to have them where they think they have support. They can bring the voters in -- their people -- into those conventions. They could have already told them, and had it planned ahead of time, that that's what we're going to do.

Then, when they get there, if they have 22,000 -- roughly --

Q You've said that. Now go on. Let's assume they don't.

MR. HILL: All right, then they have an extra period of time, up until the latter part of June --

Q How long is that?

MR. HILL: -- which is 55 days.

Q All right, 55 days.

MR. HILL: To supplement the convention signatures, if they don't have quite enough.

Q Well, if they don't have any, they've got 55 days to get 22,000.

MR. HILL: Yes, sir. If nobody shows up --

Q How about the independent candidate? What does he have to do?

MR. HILL: Independent candidate -- he, of course, files along the time that everyone else does. He has -- he can start getting his petitions signed after the primary, which would be in May, and he must turn 'em in 30 days after the second -- after the run-off. I guess, adding that up, if you could help me, I'd say it's something, if you started right after May, you're looking at the better part of 2 months.

Q I beg your pardon, about 24 or 25 days, not counting Sundays.

MR. HILL: Well, if you would -- if you started only after the second run-off -- the second run-off -- in other words, if you started after the June run-off to get the independent candidate signatures you would be restricted, if you wanted to exclude Sundays, to something in the neighborhood of 25 days. It's my thought about it that there's nothing in that statute, once the May primary is held, to prevent the independent candidate from securing signatures.

Q So he's got -- you -- according to you, you've got --

MR. HILL: Beg your pardon?

Q When may they get the petitions?

MR. HILL: They can get the petition any time after they've filed for their -- announcing their candidacy. They file like every other candidate does, back in February.

Q And they can get the petitions in February?

MR. HILL: They could get the petition, and I don't -- the last thing I would want to do is make a misstatement, and I don't -- first, I don't know for certain. I believe that that --

Q I understand that the petition is not available until after the primary.

MR. HILL: I don't believe that's correct, Mr. Justice Marshall.

Q All right.

MR. HILL: I don't believe that's correct. I'm not sure, though, that that -- I wouldn't the case would in any wise depend on the accuracy of --

Q Well, I'm not sure of it, either.

MR. HILL: I'm not sure, sir. But it seems to me that whether he had the petition in his hands in February or March or April would be relatively immaterial, because he cannot get anyone to sign that petition until after the primary is over. Unless someone wanted to say categorically, ahead of time, "I'm not going to vote in the Democratic or Republican primary, so I'll sign your petition."

But we do have a rule in our State that we think is very legitimate and very necessary that does prevent those who sign these supplemental petitions, or who sign the petition of an independent candidate, not to vote in the Democratic, Republican, La Raza, or any other party primary that we're

holding in our State.

Q How many signatures, Mr. Attorney General, does the independent candidate have to --

MR. HILL: The same -- one percent of the vote of the gubernatorial candidates in the preceeding general election.

Q Well, that is actual -- what offices --

MR. HILL: But, there is a limitation on the district. Like Mr. Hainsworth, I believe his was down to 500, maximum -- 500 maximum --

Q Is this to say --

MR. HILL: We don't impose that --

Q Is this to say it depends upon what office the candidate's running for?

MR. HILL: If it's a state-wide office it's more --

Q It's between two --

MR. HILL: But the ones before this Court are all, one for Congress and one for Representative, they both -- we put a 500, which is minimum. If you're going to have a system of elections and government in a State where you have any manner or way to, not discourage the independent candidate nor to discourage the minority party, but to have some stability -- to have some ability not to have raiding, some ability not to have candidates come into your primaries -- whatever the primary is -- and try to vote for the weakest candidate to

hurt your party, and all of the other reasons that the Courts have approved in connection with anti-raiding provisions, or provisions to show minimal support, so that you don't have total chaos, you don't have total voter confusion. Why is Texas here to defend a system with 500 vote -- 500 signatures? I'd be the last to want to just to defend it because it's a Texas statute, but I do say candidly to the Court, this is, this -- we have 500, in connection with independent candidates, we have 22,000, but supplementary petitions -- supplementary petitions, in our State. We have two minority parties that made the ballot. We have the other party here complaining that polled 548,000 votes in our State four years ago, and can turn it on any time they want to turn it on.

And we have one new party that we would welcome into the arena of good ideas, and new ideas, because they do that -- they contribute that to our process. Clearly, they do. And that's why we have a constitutional mandate that we're not to burden them, that we're not to deprive them of their associational rights, we're not to burden their free speech, and we're to accord them equal protection. But nonetheless, the Courts recognize that we have some compelling State interest, and when we show that there's a necessity for what we do, and that it's reasonable, and that it's not invidiously discriminatory, and not intended to be -- how can one honestly say...

Now, Mrs. Svanas, in all fairness, ascribes an awful lot of motives to an awful lot of things. But those are words, and she is free to express them. But constitutional issues can't be decided on that type of unsupported rhetoric. We have done nothing in our State to injure her party, nor to injure other parties. We don't meet in the Texas Legislature just to revise laws for that purpose. We changed the laws in our State in 1973 solely because we were trying to get in line with the United States Supreme Court decisions written by the majority of the Justices before whom I am now appearing and speaking on behalf of my State.

We wanted to comply with Bullock v. Carter. That's precisely why, Justice Burger, you told us in Bullock v. Carter that you saw, when we suggested that if we went to a State financing system in Texas we might run into some problems of equal protection. And you said, in Bullock v. Carter, pointing to Jenness -- pointing to Jenness, which had the cut-off line at 20 percent for parties who "should take on the burdens of primaries," and under 20 percent, those that didn't. So we changed our laws, and we said, "All right, everyone that polls 20 percent can come in under State primaries."

We weren't trying to throttle La Raza Unida. As a matter of fact, we made an exception for them. An exception for them, in S.B. 11, so they could have an option, this year,

as to whether they wanted to go primary or convention, because we respected the fact that they had earned that right. And it was maintained. But now we're faced with the very thing that we were trying to avoid, and following Bullock v. Carter, and Jenness, to change to the 20 percent and allow those parties to have State financing to supplement their filing fees.

We have a convention system, true. Is Georgia to be accorded constitutionality because she elects solely to follow the petition system, which has five -- ten -- times the required number of people that must be mustered for gentlemen like Mr. Hainsworth to gain the ballot, as opposed to the Texas system which says simply, "Conduct conventions on election day." You don't have to have a great, big apparatus like was required in Ohio; you don't have to have primary elections; you don't have to send delegates to a national convention, as they did in Williams v. Rhoses. All we ask you to do, or require you to do, is simply to have conventions in counties and precincts where you think you can muster some support.

Q But you've got to have -- but, in any event, you've either got to get to conventions or get signatures that total 22,000 --

MR. HILL: Yes, sir, Mr. Justice White. And if we're to have

Q I just wondered -- I just wanted to make sure.

MR. HILL: And I honestly -- how can we say, under

constitutional principles that we've been dealing with in Williams, and Jenness, and Rosario, of the majority opinions in those cases, and the compelling State interest doctrine, the necessity, that that -- that we're to second-guess that kind of a system. Why? Twenty-two thousand signatures, gotten together through convention process, or supplemented -- if you had a minimal -- we ought to require some minimal degree of support before people can --

Q Yes. But, now, how would you certify the names of the people who attended your convention?

MR. HILL: Oh, simply have their name and addresses. They come in the door, they sign up and tell who they are, and where they live --

Q And do those have to be notarized?

MR. HILL: It says, "Certified and delivered to the Secretary of State." I assume that the State chairman, or county chairman, or precinct chairman who certify them probably notarize them. But it doesn't matter.

Q Yes.

MR. HILL: It doesn't matter. It's not a very relevant point, in my opinion. It's that they are there, and they sign up, and the officer is -- he can certify the whole list on one petition under one notarization, you see. They're presumably in a room, like the Socialist Workers Party had one big meeting. They were there. They turned out. They

signed the list, and put down their address, and we didn't challenge a one of them. Not a one of them. They were sent in, they had enough numbers, they got on the ballot, and that's all there was to it.

Q Well, what's the likelihood of people attending a independent party's, or a minority party's, convention and yet be disqualified, or unqualified from -- to sign this petition?

MR. HILL: Well, sir, in theory only. The only disqualification is that if you have attended the Democratic or Republican Primary, and voted -- what it is, you see, we don't have party re-

Q When? When?

MR. HILL: In May. The first Saturday in May. We don't have party registration in Texas. When you go into a party primary in Texas, you simply take your poll -- your, excuse me! (poll tax!) -- your registration certificate, thank goodness, in, and you -- it's stamped that you voted in the Democratic primary. We say, in Texas, that puts some moral obligation on you. There is no legal result of it other than -- you cannot go over, for example, and participate in the Republican convention that night. That's against the law. The Republicans can't come over and into ours. We have that much law in sanctity to our processes. Nor can I go and help an independent candidate get his petition. Nor can I go

participate in a convention of La Raza, or Socialist Worker, the New Party, or any of the others.

But when it comes to November I can vote for whomever I please. We have write-ins. What's wrong with our election system?

Q What about the absentee ballots?

MR. HILL: Absentee balloting is a remedial piece of legislation, a very great thing for this country, and serves a very, very wonderful purpose. But it's never been held by any court that that remedial legislation -- which is, frankly, intended for those who must have it, or should have it -- for reasons of frailty, or absence, or problems beyond their control. But we contemplate in this country, as I understand our election proceedures, that people take the time and trouble to go vote. That's not the purpose of absentee voting, is to say, "I want to go fishing." And it's never been thought nor held that absentee voting must be opened up to everyone, under whatever circumstances they may be operating at that particular time in their political development. It's never been held not only improper, certainly, never been raised --

Q Do you think Texas could pass a law that absentee ballots are -- would be accepted, provided they are either Democratic or Republican?

MR. HILL: I don't believe, Mr. Chief Justice --

Q It's not that wide open, is it?

MR. HILL: I know it's easy to criticize, and it's easy to make it --

Q No, I mean it's not as wide open -- that, you mean we have -- there's nothing we can say about absentee ballots that is outside the jurisdiction of this Court?

MR. HILL: I don't mean outside --

Q Surely you don't mean that?

MR. HILL: -- the jurisdiction of this Court. I say it's outside the pale of the United States Constitution to protect the rights of those to it. You and I and others may agree or disagree about what our law should be on absentee --

Q Well, then, what we are restricted to the Constitution, so you do say it's beyond our jurisdiction --

MR. HILL: I say it's beyond the scope of overturning the lower Court's decision in this case. There would be no basis, in my humble judgement, for this Court to say, because Texas has not seen fit to plant on its absentee ballot in our State the names of every party, and that's what it boils down to -- what happens when you vote absentee in Texas today is you go down to the county courthouse, and you're either taken to a voting machine or a printed ballot, and the people on the ballot are Democrats and Republicans. It's not designed, though, as a discriminatory matter. It's not done in our State for that reason. It's simply that the

absentee ballot, very frankly, Justice Marshall, it would be obtained today by the Texas New Party in an absentee situation, is not a great problem. Now, there're some things that we shouldn't have --

Q Is not a great problem to whom?

MR. HILL: Well, sir, it's not a great problem to them. Where is the hue and cry from the Texas New Party for absentee voting? Who are they going to vote absentee today? Is this an imaginary problem, or are we to deal, hopefully, with real problems?

Now you reach a point, yes -- if La Raza has -- La Raza may have reached that point. I don't foreclose, and I don't foreclose a circumstance arising where another party was sufficiently strong that a deprivation of absentee balloting really would dilute down -- bear in mind what we're talking about -- their right to get on the ballot -- that's all that's involved in the absentee voting, as far as the minority parties are concerned. It doesn't have anything to do with who gets elected. It has to do with whether they get enough people to get on the ballot.

Q Well, I would assume you'd also say it doesn't matter as to who gets elected as to whether they get on the ballot or not, as long as they stay a minority party. That's your position, isn't it?

MR. HILL: No, sir. No, sir.

Q Isn't that your position?

MR. HILL: No, sir, not at all. Not at all.

Q You're not really worried about 'em, are you?

MR. HILL: Well, yes, sir, I like to think that I am. But my point is that the absentee balloting is not, in my humble judgement, first, a severe matter as far as numbers are concerned; and, secondly, it has been held by the Courts that it does not rise to the dignity that would overthrow an election law or an election process, from a constitutional standpoint.

If I might very quickly just look over the -- well, did we discuss the 5 percent county bonus that was -- That is just simply a manner and way in which, under our State Financing Law, we compensate the chairmen and staff of those who are charged with the responsibility of conducting the election. It's not a bonus; it's just a method that we have selected to accomplish that purpose. So we do respectfully submit that pursuant to the law pronounced by this Court in Williams v. Rhodes, respecting at all times the right of the vote, the right of the ballot to all citizens, respecting the equal protection requirements of that case, knowing that you require us to show a compelling State interest and a necessity for the type of regulations that we have, we do submit that we have here a reasonable system, and one that has not been, and is not invidiously discriminatory, and one which has served, not

hindered, the growth of minority parties in our State, and one which we feel is reasonably related to the State principles that we feel, under the law, we have a right to carry out; that is, to further the notion of requiring, before you are on the ballot, that you have a minimal degree of support, and that you not raid other parties to obtain that support. That, in other words, it's not wrong to require a different type of support for a candidate, or for a party, so that he can have some semblance of a reasonable base to enter the process, and appear on the ballot. I think if you did not have at least those minimal requirements you would have, simply, a confused and cluttered, chaotic situation.

Q Mr. Hill, with respect to the absentee balloting provision, we're talking now about absentee ballots in the primary election --

MR. HILL: Absolutely.

Q Anybody, I take it, is entitled to get an absentee ballot in the general --

MR. HILL: Absolutely. I hope I had made that clear. Now, that's when I referred -- now, I'm afraid I was, perhaps -- I apologize greatly if I offended you, Justice Marshall; I simply meant to state that the use of absentee voting in the primary posture, when these other parties are having conventions -- they're not having primaries -- does not really get at the same problem you would be getting at

as if after they've gained ballot status through that convention process, then of course they should be accorded, and they are accorded --

Q That's what you said --

MR. HILL: -- the right to absentee balloting.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Mr. Hainsworth?

REBUTTAL ARGUMENT OF ROBERT W. HAINSWORTH, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. HAINSWORTH: Mr. Chief Justice, and may it please the Court: there are a few points that I would like to attempt to call to the attention of the Court.

One, after the case of Bullock v. Carter the party primary filing fees were lowered in the case of State Representative to the sum of $200. The ultimate nominating petition provided that 2 percent of the vote cast for Governor of the party in the last preceeding general election would be sufficient in that area for the person to get on the party primary ballot. And it should be at least 25 signatures, but not to exceed 300. I would like to make this distinction that the 5 percent of the persons who voted in the area applies in the Article 13.50 to all who cast a vote for Governor in the last preceeding general election. You may have a Democratic

and Republican running some other candidate under another name, but you add all of those in together to get the 5 percent in that particular area or district.

Whereas, the party primary nominee only has to get 5 percent of the -- no, not 5 percent, only 2 percent of the total number of votes cast for the Governor of his party. So it may be down to 25, and it may be up, but it's not to exceed 300. And if the minor major party -- like the Republican Party in Texas -- if their candidate for Governor in this district only gets 1,000 votes, 2 percent of that would be about 20, and that would put him in the primary.

Now, with respect to notarization. Under the old law, with respect to party primary candidates, there was nothing said in it about notarization. So I presume that they could have their petitions signed without having them notarized. It also provided that they had 90 days to get those signatures -- the party primary candidate. But the independent candidate, under Article 13.50, only has 30 days.

Now, the Honorable Attorney General, Mr. Hill, was talking about both minor party -- minor parties -- and independent candidates. And there is some distinction between those two. Now, an independent candidate, in order to get on the ballot, has to have 5 percent of the votes cast in that area, or district, for that particular office; whereas, the minor party candidate only has to get one percent -- only

one percent, of the votes cast either for the general -- for Governor throughout the State, or for -- wherever. But he only has to get one percent.

Now, if the independent candidate only had to get one percent, that would be just fine. But they have made it 5 percent, and when you add in 30 days limitation, and notarization, I submit to the Court that there is too large a burden placed upon the independent candidates.

Q I thought he only had to get 500.

MR. HAINSWORTH: The independent candidate has to get 500, yes, sir.

Q You said 5 percent.

MR. HAINSWORTH: Well, now, it's like this. You're supposed to get either 5 percent --

Q -- or 500.

MR. HAINSWORTH: Or 500. And you can take the rest --

Q So nobody has to get more than 500.

MR. HAINSWORTH: I beg your pardon, sir?

Q You never have to get more than 500.

MR. HAINSWORTH: You never have to get more than 500.

Q So --

MR. HAINSWORTH: However, the 5 percent may be more than 500.

Q Yes. So you really don't have to get 5 percent, in every case.

MR. HAINSWORTH: Not in every case. Yes, sir.

Equal protection of the law for independent candidates, I respectfully submit to the Court, that the opinion of the 3-Judge District Court in Hainsworth v. Bullock, and Hainsworth v. White, before this Court, be reversed on the grounds that the requirements under Article 13.50 are so strict and burdensome that there is violation of the Fourteenth Amendment, Section One, of the United States Constitution of equal protection of the law; and that there is no compelling State interest involved in this situation, or in this case, which requires the State of Texas to have this particular Article 13.50, with respect to an independent candidate getting on the ballot.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hainsworth. Thank you, Mrs. Svanas. Thank you, Mr. Attorney General. The case is submitted.

[Whereupon, at 2:46 o'clock p.m., the case was submitted.]