In the

Supreme Court of the United States

MARVIN MANDEL, GOVERNOR OF MARYLAND, ET AL.,

APPELLANTS,

V.

BRUCE BRADLEY, ET AL.,

APPELLEES.

No. 76-128

Washington, D. C.
February 23, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

MARVIN MANDEL, GOVERNOR OF MARYLAND, ET AL., Appellants,	:	
v.	:	No. 76-128
BRUCE BRADLEY, ET AL., Appellees.	:	

Washington, D. C.,

Wednesday, February 23, 1977.

The above-entitled matter came on for argument at 11:50 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

GEORGE A. NILSON, ESQ., Deputy Attorney General of Maryland, Baltimore, Maryland; on behalf of the Appellants.

JON T. BROWN, ESQ., 1700 Pennsylvania Avenue, N.W., Washington, D. C. 20006; on behalf of the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-128, Mandel v. Bradley, et al.

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

ORAL ARGUMENT OF GEORGE A. NILSON, ESQ.,

ON BEHALF OF THE APPELLANTS

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

My name is George Nilson. I am Deputy Attorney General for the State of Maryland, and I am here on behalf of the appellants to argue in favor of the constitutionality of Maryland's filing deadline for independent candidates seeking a place on Maryland's general election ballot.

Appellee Bruce Bradley, an unsuccessful independent candidate for the United States Senate,and his supporters contend that the deadline is so far ahead of the election that it impinges on their rights under the First and Fourteenth Amendments to the United States Constitution. The three-judge court agreed, feeling bound by this Court's summary affirmance of the three-judge court decision in Salera v. Tucker, out of Pennsylvania.

As in most other states, the bulk of the candidates who appear on Maryland's general election ballot do so as a consequence of their success in the party primary elections. Primary elections are held by each political party with which

ten percent or more of the state's registered voters are affiliated. Other candidates who wish to have their names appear on the general election ballot must file nominating petitions in accordance with the requirements set forth in section 7-1 of Article 33 of the Maryland Code. Those requirements can be summarized as follows:

First, the petitions must be signed by three percent of the registered voters eligible to vote for the office in question determined as of four months prior to the primary election.

Second -- and this is the element upon which the court below focused -- the nominating petitions must be filed by the same date on which party primary candidates must file their certificates of candidacy. That is seventy days before the primary election. This results in an early March deadline in presidential election years, when the primaries are held in May, and an early July deadline in other years when the primaries are held in September.

Next, the nominating petitions may be circulated and signed at any time prior to the deadline. There is no gathering period restriction like those which have been present in other cases in this area previously considered by this Court, nor is there a gathering period restriction similar to the one that was present in the Salera case.

Next, persons who wish to vote in the primary

election are not precluded from doing so or having signed a nominating petition on behalf of an independent candidate. And petition signers need not state their intention to vote for the candidate whose petition they sign.

And, finally, unlike the case in the situation in some other states, petitions may be circulated by nonresidents and persons not registered in Maryland, and the individual voters' signatures need not be notarized.

The challenge in this case, and the opinion of the lower court which we seek to reverse, focused entirely on the filing deadline of 70 days before the primary election, and particularly on the deadline as it operates in a presidential election year where it occurs in early March.

In this case, on the March 8, 1976 deadline established by the Maryland statute, Mr. Bradley filed a number of signatures which, if they had all been valid signatures of registered voters, would have been sufficient to satisfy Maryland's three percent requirement within the statutory deadline. However, more than 20 percent of those signatures proved to be invalid. And when Mr. Bradley was thus denied a place on the Maryland ballot, he filed suit in the United States District Court.

He argued below and he argues to this Court that Maryland's early filing deadline, as he characterizes it, denies him equal protection of the law as anunreasonably

impinges upon his First Amendment rights and those of the voters who would support him.

He succeeded in persuading the three-judge court below that Maryland's deadline falls too far in advance of the general election and lacks sufficient supporting state interest and therefore impinges upon his constitutional rights. In essence, he persuaded the lower court that its decision in this case was controlled, absolutely controlled by the decision of the three-judge court in the Pennsylvania case of Salera v. Tucker, which was summarily affirmed by this Court earlier this year.

Based upon its reading of the summary affirmance in Salera v. Tucker, the three-judge court below granted Mr. Bradley injunctive and declaratory relief.

With the benefit of the additional time allowed him by the lower court, he went on to become a candidate, albeit an unsuccessful one, in the general election of 1976. This appeal followed the granting of relief by the lower court and this Court noted probable jurisdiction in October.

While the case is now before the Court for plenary consideration on its merits, and while this Court thus need not concern itself with the significance of its prior summary affirmances to quite the same degree as the lower courts must, we have argued in our briefs that the lower court here substantially misapplied the teachings of Hicks v. Miranda and its

proginy with respect to the significance of prior summary dispositions by the Supreme Court. It did --

QUESTION: Hicks v. Miranda dealt with the significance of prior dismissals for want of a substantial federal question, didn't it?

MR. NILSON: That's correct, it did. But I believe the Tully case subsequent to Hicks v. Miranda, strongly indicates, if not clearly holds that summary affirmances from three-judge court decisions would be treated the same way and accorded the same weight that --

QUESTION: At least as much weight.

MR. NILSON: At least as much weight.

QUESTION: There is nothing new about that --

MR. NILSON: That's correct.

QUESTION: -- with respect to summary affirmances, was there? In Hicks v. Miranda, the new ground it broke, if it was new ground, was it had to do with dismissals for want of a substantial federal question, wasn't it?

MR. NILSON: That's correct. But I don't believe prior to Hicks v. Miranda it had been clearly established just what the import of summary affirmances was either, and I think even after Hicks v. Miranda there were some commentators who argued that there was still a distinction and that perhaps summary affirmances were not entitled to quite as much weight as the Hicks kind of summary disposition. But I think that the

Tully decision of this Court places the two on equal footing.

The lower court, we submit, the error that it made was to adopt a particular reading of the lower court's decision in Salera v. Tucker. And assume that this Court summarily affirmed the decision in that case, in the Salera case, on precisely the same analytical grounds which the court below thought had been applied by the lower court in Salera.

The Pennsylvania statutory scheme dealt with in Salera required independent candidates to gather their nominating petition signatures within a three-week period ending 49 days before the primary election and either 218 or 244 days before the general election, depending on whether it was a presidential election year or not.

The Salera court felt bound to uphold the three-week gathering period in light of the opinion of this Court in Storer v. Brown, upholding on its face a 24-day gathering period in California.

I would submit that the Salera court was wrong in that respect, particularly insofar as it examined the gathering period by itself. Having thus upheld that short gathering period, feeling compelled to do so, the Salera court then went on to invalidate the Pennsylvania requirement that signature gathering stop and all petitions be filed 49 days before the primary election.

The lower court here chose to read Salera as treating

these two requirements, gathering period and deadline, as separate and distinct from one another, and assumed that this Court likewise viewed them as separate and distinct in summarily affirming.

We would submit that such a reading of Salera is not correct and would be clearly contrary to the analytical approach established for these kinds of constitutional questions by this Court's written opinions in Williams v. Rhodes, Jenness v. Fortson, American Party of Texas v. White, and Storer v. Brown. We believe that the jurisdictional statement in Salera, thin as it was, properly presented to this Court the question of whether a three-week signature gathering period in conjunction with an early deadline was unconstitutional.

We further submit that the proper way to read this Court's summary affirmance in Salera is as a holding that the combination of such a limited signature gathering period and an early filing deadline is unconstitutional.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

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

AFTERNOON SESSION -- 1:00 P.M.

MR. CHIEF JUSTICE BURGER: Mr. Nilson, you may resume.

MR. NILSON: Prior to the luncheon break, I was discussing Salera v. Tucker and the summary affirmance and noted that the jurisdictional statement in that case, thin as it was, had properly presented to this Court the question of whether a three-week signature gathering period, taken in conjunction with an early deadline, was unconstitutional.

We further submit that the proper way to read this Court's summary affirmance in Salera is as a holding that the combination of such a limited signature gathering period and an early filing deadline is unconstitutional. We have no quarrel with this result. We believe that it is consistent with the prior written opinions of this Court to which I have referred prior to the break.

However, such a result in no way compels or even suggests a conclusion that Maryland's filing deadline, unaccompanied as it is by any limitation on the period during which signatures may be gathered or by any other significant restriction, is unconstitutional.

QUESTION: Mr. Nilson, let me interrupt you. Has Mr. Bradley made any noises about running again?

MR. NILSON: About running again?

QUESTION: Yes.

MR. NILSON: To the extent that he continues to desire

to seek the United States Senate, there are no present election campaigns. I don't believe he has made any statement that I am aware of, certainly not in the record in this case, as to whether he will or will not. I believe he did indicate during the campaign that he was -- that this was not just a one-shot foray, that he was into politics.

QUESTION: You don't think the case is moot?

MR. NILSON: Pardon me?

QUESTION: You don't think the case is moot?

MR. NILSON: I do not believe the case is moot. I think this Court's opinions on mootness, especially on the context of election cases, make it clear that the case is not moot. We have a statute that has been declared unconstitutional, admittedly the elction is over, but Mr. Bradley as far as we know, and the record indicates nothing to the contrary, is in politics to stay and will again be an independent candidate. If he is a candidate again, he would be an independent.

I think, as I say, Storer v. Brown discusses the mootness question. The mootness principles are also discussed in the lower court opinion in Salera. I think all of those cases are --

QUESTION: Why isn't it moot? You say it is likely -- it is difficult --

MR. NILSON: It is the kind of situation which is likely to occur again with the filing deadline and yet will be

susceptible of evading review. And I think the opinion in Storer indicates clearly the reasons why in these kinds of cases they should not be considered moot. It will resolve the challenges and the questions prior to the next election so that we don't have last-minute cases brought up again on the eve of the election, as this case here. And I think --

QUESTION: Well, they always are.

MR. NILSON: Pardon me?

QUESTION: I say they always are.

MR. NILSON: That's correct.

QUESTION: Whatever we do, whatever you do with this case.

MR. NILSON: There will be another case, I am sure.

QUESTION: There will be many of them in the next election year.

MR. NILSON: But I think at least it is important to resolve the constitutional status by this Court now that we are here with respect to the filing deadline under Maryland law.

I might add that the lower court's opinion added an element of uncertainty even beyond the particular holding in that case by indicating or suggesting that perhaps Mr. Bradley was entitled to even more relief than effectively a primary date deadline. In addition, the analysis of the lower court that was applied to our statute raises serious questions even about the modification of the statute that Mr. Bradley has suggested in

his brief.

An examination of the primary written opinions of this Court which control the outcome of this case, to wit, Williams v. Rhodes, Jenness v. Fortson, American Party of Texas v. White, and Storer v. Brown, enables us to identify certain basic principles which are to be applied.

First, generally speaking, where state ballot access laws are challenged, they should be considered in their totality. And individual provisions, at least where they interact with one another and relate to one another, should not be singled out and treated in isolation. The exception for an individual or a single factor which does not interact is discussed in this Court's opinion in Storer v. Brown and clearly is not applicable in the present situation.

Secondly, the First Amendment and equal protection analyses merge, and in the context of requirements imposed upon independent candidates boil down to two related tests. First, do ballot access requirements constitute -- and I am quoting from this Court's prior opinions -- insurmountable obstacles or suffocating restrictions which make it impossible or impractical for an independent to gain a place on the ballot; or do they provide a feasible opportunity for reasonably diligent independence to run.

Secondly, do they promote a substantial imbalance in the relative difficulty for independents and primary candidates.

In other words, are they inherently or invidiously more burdensome as to independents.

In resolving the issue of the substantiality or discriminatory nature of the ballot access requirements, this Court's opinions instruct us to examine actual experience in the state in question as a principal guide. Substantial burdens and discriminations may be justified even if they exist if they serve compelling state interests, if they are -- and again, I am quoting from American Party of Texas v. White -- reasonably imposed in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways.

With respect to compelling interests, this Court has established that the states have a compelling interest in preserving the integrity of the electoral process and regulating the number of candidates on the ballot to avoid undue voter confusion and are free to assure themselves that a candidate is a serious contender with a significant level of community support.

This Court's opinions also establish that it is a legitimate and compelling interest on the part of the state to provide parity of treatment and to fix identical deadlines for primary and independent candidates respectively.

And finally, it is clearly permissible to provide different routes to the printed ballot so long as they are not substantially unequal in their difficulty.

In applying these principles, this Court has only once

invalidated a state ballot access regulatory scheme in a written opinion, and that was Williams v. Rhodes, where this Court invalidated the Ohio scheme calling for 15 percent of the voters to sign petitions on behalf of parties by February 7th in the election year and required these parties, these lesser parties, to develop an extensive party organization and engage in other organizational activities prior to this February 7th deadline.

Conversely, in Storer v. Brown, a 24-day gathering period was facially upheld, coupled with a five percent signature requirement, although the case was remanded for reconsideration in light of the number of voters -- the question involving the number of voters who would be disqualified from signing nominating petitions by their participation in primary elections.

In the American Party case, a deadline of 120 days before the general election was upheld, coupled with a 55-day gathering period and requirements as high as 5 percent, depending on the office, together with a disqualification of primary voters from signing nominating petitions.

And finally and perhaps most importantly, in Jenness v. Fortson, a deadline of 69 days before the primary, 150 days before the general election was upheld, even though coupled with a six-month gathering period and a five percent requirement. The Georgia law upheld in Jenness was either the same as or more stringent than the Maryland law here at issue in every single respect except that here the deadline occurs approximately three

months earlier in a presidential election year, three months more prior to the general election.

This Court's summary affirmances of lower court decisions upholding valid access restrictions are entirely consistent with these written opinions. In Socialist Labor Party v. Rhodes, which was summarily affirmed by this Court, as Sweetenham v. Gilligan, the issue was squarely presented to this Court as to the validity of what was then Ohio's nine-month deadline, nine months before the general and 90 days before the primary. That case was summarily affirmed.

In Pratt v. Begley, another summary affirmance, this Court was squarely presented with the issue of whether -- of the validity of a 55-day pre-primary, seven-month pre-general deadline. Again, Pratt v. Begley was summarily affirmed.

Jackson v. Ogilvie, also involving a pre-primary deadline and a five percent requirement, again summarily affirmed.

Auerbach v. Mandel, Maryland People's Party v. Mandel, and Wood v. Putterman, all dealing to one degree or another with the precise nominating requirements now before this Court, with all three lower court opinions upholding the law in the early seventies and being summarily affirmed by this Court. Notwithstanding the lower court's dismissal here of these three summary affirmances involving the precise same statute we are now presented with, we submit that those cases did raise the constitutional questions now presented. They were clearly posed in the

jurisdictional statements, at least in Auerbach and People's Party, and Auerbach was later cited in Storer v. Brown, in Footnote 10, as constituting a prior approval by this Court of Maryland's three percent nominating requirement.

Against this array of authority, the sole aberration is Salera v. Tucker as construed by the lower court here and the opinion of the lower court here. While we have no quarrel with the result in Salera, as I have indicated earlier, we believe that its reasoning as perceived by the lower court was clearly wrong and inconsistent with the analytical framework previously established by this Court. Never before has a filing deadline been stricken in isolation and standing by itself.

QUESTION: Auerbach was written also by Judge Winter, wasn't it?

MR. NILSON: That is correct. The lower court's opinion --

QUESTION: So he was familiar with it?

MR. NILSON: He was indeed familiar with it. He was not, of course, familiar with precisely, except in terms of reading the jurisdictional statement, with precisely what was presented to this Court and what the deliberations of this Court involved in dealing with Auerbach. But I think an examination of the opinion, even though it may have been authored by Judge Winter, of the opinion in Auerbach and the papers presented to this Court reflect a clear presentation of the constitutional

issue to this Court in Auerbach. And I think our view of that is enhanced or supported by the citation of Auerbach as a case on the merits upholding the three percent requirement, and such a citation was made in Storer v. Brown, in the written opinion of this Court in Storer.

Insofar as Salera was relevant to the lower court here and is relevant to this Court now, it should be viewed only as standing for the proposition that the combination of a limited three-week gathering period and a relatively early filing deadline pose too substantial a barrier to independent candidacies and that this combination is not sufficiently supported by the state interests which were discussed in Salera which were more limited than the ones presented here and discussed in this case.

Regardless of the alternative way in which one could read the lower court's opinion in Salera, the view just described of the consequence of this Court's summary affirmance there is the only way to avoid a fundamental conflict between the Salera case and this Court's prior written opinions and summary affirmances.

This Court's opinion in Fusari v. Steinberg, as well as the Chief Justice's concurring opinion in that case, the dissenting opinion of Mr. Justice Brennan in Colorado Spring Amusements, and the dissenting opinions of Justices Brennan and Marshall in Sidle v. Majors, clearly indicate that the lower courts have an obligation to construe summary affirmances in a

way in which to the extent possible they are consistent with one another and not contrary to this Court's prior written decisions. That obligation was not fulfilled by the court below.

Viewed as a whole, the Maryland petition nominating system is substantially more liberal than that of many states and does not place insurmountable restrictions in the way of an independent candidate. I summarized the features of our law at the beginning of our argument. It is summarized at pages 23 to 24 of our brief and I think does not merit further comment, other than to again reemphasize that there is no limitation on the gathering period and there are no significant disqualifications in terms of who may sign the petitions.

We also submit that when viewed in relative terms, the record below indicates that there is no substantial imbalance as to the route available in Maryland for independent candidates and the route available to party primary candidates.

When we turn to actual experience in Maryland, as we are told by this Court's decisions we should, we find that independent candidates have qualified for a place on the ballot with sufficient regularity to indicate that the obstacles are not insurmountable.

In 1974, the record demonstrates that eight candidates qualified for state legislative contests, and in 1976 two candidates qualified for congressional contests by the March 8th deadline, and Mr. Bradley himself would have qualified but for

the invalidation.

Even if this Court should determine that the obstacles imposed are substantial, either in absolute or relative terms, and that the actual experience is not sufficient to indicate the feasibility of a reasonably diligent candidate's qualifying, the statute must be upheld if it is based upon compelling state interests which cannot be served equally well in significantly less burdensome ways.

There are significant and compelling state interests at stake here and they go beyond, as I have indicated above, those discussed in Salera. The prevention of frivolous and fraudulent independent candidacies maturing only after the conclusion of the primary elections has been recognized as a substantial interest, and I would submit it is further enhanced by the filing deadline established under Maryland law.

Related interest is the elimination of voter confusion caused by late blooming candidacies, a consideration which may be especially important in a presidential year when political activity is both more intense and more long lasting.

The need to insure that both party primary candidates and independent candidates, including those who obtain general election ballot access after all of the validation and primary election procedures are over, to insure that they are afforded relatively comparable treatment and that neither is given an unfair advantage by establishing the same filing deadline and

providing for a system when at about the time of the primary election the voters and all candidates will know who is going to be on the general election ballot. A system not requiring the filings to take place until on or after the primary election would leave up in the air the status of independent candidates in terms of their position on the general election ballot.

The fostering of public discussion of campaign issues among all candidates when voter interest is at its peak during the primary election, rather than allowing independent candidacies to remain embryonic or dormant until the primaries have ended.

The prevention or alleviation of administrative problems that might surface if the petition verification process and likely challenges such as this one were telescoped into a shorter and later period of time.

And finally, the primotion of all of these interests, while still preserving the right of Maryland voters to express themselves early in a presidential election year as to their choice for presidential nominees.

The testimony of Professor Smolka, which is summarized at pages 8 to 9 and 28 to 29 of our brief, indicate I believe and illustrate the fairness of the system and highlight the fact that independent candidates are not treated unfairly relative to primary candidates.

With respect to the earliness of the deadline and the contention that it hampers the independent candidate, I think it is well known, of course, to take the presidential primary elections as an example, that the presidential primary is held in New Hampshire in February of the election year. If the decision below stands and if this kind of analysis stands, it is entirely conceivable that the next time around in a presidential election year someone will be arguing that it is unconstitutional to provide such an early primary in New Hampshire, which in fact even forces the candidates to be actively campaigning in the year prior to the election.

I think right now Mr. Bradley has contended in his brief and in argument below that it is unfair to make him start before the period immediately preceding the primary on the grounds that the primary election candidates are not required to start so early but only have to begin during those last 70 days before the primary. That is not the way politics are run, that is not the way elections are run.

In the State of Maryland now, we have almost one article a day on the gubernatorial candidates for the 1978 election, and we are in 1977 and early 1977. Campaigns must start early.

QUESTION: Mr. Nilson, did I understand you to agree as to what standard is applicable to this case?

MR. NILSON: Well, I have gone through the standards.

I believe they are fairly clearly emerged from the Court's opinions, and I believe that they were not properly applied by the lower court.

QUESTION: I am not talking about were they applied. Do you think there is a compelling interest?

MR. NILSON: That is only if you only reach the compelling interest question, and you only look at this Court's opinions, identify in them what are compelling interests. If you find that the relative access routes for the independents and the primary candidates are so disparate as to give a severe advantage to the primary candidate or that they impose such a heavy burden --

QUESTION: Well, you don't reach that problem unless you find a discrimination?

MR. NILSON: That's correct, or the excessively heavy nature of the burden placed on independents. And only when yo- find those do you get to the compelling interests.

QUESTION: Well, assume we did and then the question might become whether you could serve your ends by some other less burdensome way. What is the state's reason for having the particular early filing date?

MR. NILSON: It establishes a filing deadline -- there are a number of interests which I have outlined, but basically it establishes a filing deadline which is the same for primary candidates and independent candidates.

QUESTION: Well, what is so good about that?

MR. NILSON: It brings all of the candidates out at the same time so that everybody knows who his potential opposition is. In terms of --

QUESTION: Yes, but the party people are just running in the primary.

MR. NILSON: Well, they are not just running in the primary. Nobody can run a primary election without having an eye to the general election.

QUESTION: I understand that, but you don't know -- until there is a primary, you don't know who is going to be on the ballot.

MR. NILSON: That's true, but --

QUESTION: And so the fellow who is asked to circulate his petitions prior or before the primary is really in a different kind of a campaign, isn't he?

MR. NILSON: Well, he is in a different kind of campaign with the same objective. But what the law requires is that he do what he is required to do to establish the substantiality of his support by the same filing deadline as everyone else, and that enables the state election officials to use the next 35 days to validate those petitions and determine whether he will truly be on the ballot, so that you then come down to the period in time immediately prior to the primary election when it is basically known that you have a set of primary candidates for one

party, another set of primary candidates for the other --

QUESTION: They only need 35 days to determine whether his signatures are all right.

MR. NILSON: That is as long as the process goes in the election --

QUESTION: That is a lot longer than 35 days until the election.

MR. NILSON: Pardon me?

QUESTION: It is a lot longer than 35 days until the election?

MR. NILSON: Until the general election, that's true.

QUESTION: In terms of being able to check, the filing date could be much later?

MR. NILSON: In terms of the administrative problem of validation, that is correct, certainly as long as the validation stops --

QUESTION: Well, what would the state lose, what interests would the state, how would the state be substantially hampered if the filing date were the primary election date?

MR. NILSON: If it were the primary election date, the candidates in the primary elections would not know who their potential opposition was going to be in the general election, their potential opposition.

QUESTION: Well, the ones that were chosen at the primary election would.

MR. NILSON: The ones that were ultimately chosen, that's correct.

QUESTION: If the independent candidates file on the date of the primary election and if their signatures are good, they will then be on the ballot.

MR. NILSON: That's correct. But take the voters of a major party who are trying to consider who they want their party to nominate. One very important factor in their making that decision at the primary election is who is the opposition going to be, what kind of a chance in the general election is our party's candidate going to have. If there is a strong independent who is going to be on that general election ballot, the presence of that candidate can be a very important factor to voters who are voting in the primary election, because the primary voter in, say, the Democratic or Republican Party may say, look, we know that Candidate X is going to be on that ballot as an independent, he has a very strong appeal of this type, and that means that you --

QUESTION: Don't you think, Mr. Nilson, that the members of the major parties are entitled to this information, that those who are considering whether to sign a petition for an independent are not entitled to this information?

MR. NILSON: But, you see, the people who are asked to sign a petition for an independent are not having to make choices among people. They are presented with a petition --

QUESTION: No, but it is sort of a commitment in a sense.

MR. NILSON: They can sign one petition, they can sign seven petitions. They are not being asked to make a choice among a group. They are simply being asked by a particular candidate, will you support me for a place on the ballot.

QUESTION: You mention that there is a lot of press concerning the run for governor next year. Does any of that press involve independent candidates?

MR. NILSON: The press simply involves candidates.

QUESTION: Not independent candidates?

MR. NILSON: I think it is fair to say that the principal discussion now is about the major party candidates, that is correct.

QUESTION: And the only time you get to talking about independent candidates is after the primary, am I right or wrong on that?

MR. NILSON: No, the time that they get to talking about independent candidates is when they begin conducting a serious campaign.

QUESTION: And that is after the primary?

MR. NILSON: No.

QUESTION: Well, does the media do anything before the primary?

MR. NILSON: The media certainly does. They cover the

campaigning activities.

QUESTION: Is that in the record? I thought the record said no.

MR. NILSON: Well, the record indicates that Mr. Bradley was having difficulty getting media coverage prior to the campaign season, but that is not because necessarily --

QUESTION: Is that contradicted?

MR. NILSON: I don't believe that is contradicted.

QUESTION: Well, isn't that a handicap to him?

MR. NILSON: It is a handicap to him, but he is not constitutionally --

QUESTION: Well, don't you think that is as important as the ordinary vote in a primary voter in a primary knowing something?

MR. NILSON: I don't see anything that as a matter of constitutional law entitles him to the kind of fallout attention that he would get from the press as a result of their paying attention to the primary campaigns.

QUESTION: Except it questions your right of the state, the reasons the state did this, and the only reason you give is that the primary voter of the major parties will know who the independent is.

MR. NILSON: Well, I don't believe that is the only reason I have given. I have also mentioned to the Court the prevention of late-blooming or frivolous candidates. We have

had situations in Maryland, for example, where a same name candidate has developed, where other candidates have emerged when they have been allowed to emerge late in the process who have a particular political appeal and can siphon off votes.

QUESTION: So for that reason, Mr. Bradley can't go?

MR. NILSON: The early deadline prevents that from happening, and that is a legitimate interest of the state.

QUESTION: But yet it showed that the little time that the court gave Mr. Bradley did get --

MR. NILSON: Well, the court ended up giving Mr. Bradley until July, and he did with that extra time secure sufficient signatures.

QUESTION: Well, has the state made any move to change it to comply with that?

MR. NILSON: There is pending before the General Assembly a bill now which would alter the present scheme. It is pending. It has not been enacted or acted upon. That bill would require a portion of the three percent signatures to be filed on the present filing date with the remainder, I think it is one percent the first time and two percent the second time, the remainder to be filed on the primary date in presidential election years and thirty days after the original filing in other election years. But I would strongly urge this Court that there is nothing in this Court's written opinions that establish that such a change is constitutionally necessary.

We have had candidates get on the ballot with some regularity in the last two elections under the present scheme. That demonstrates that it is a reasonable and possible and feasible ballot access method.

QUESTION: For statewide office?

MR. NILSON: We have not had candidates other than Mr. Bradley make a serious effort for statewide office as an independent that I know of in the two elections that I am dealing with.

QUESTION: Your figures don't help too much.

MR. NILSON: Pardon me?

QUESTION: Your figures on the men running for Congress and local candidates don't help too much.

MR. NILSON: Oh, I think the local candidate figures help. It is the same three percent requirement, and I think this Court made it very clear in Storer, for example, that when the higher up the office is, it is a harder job and you have got to expend more effort. I think in Storer the Court indicated --

QUESTION: The man running for state legislature has to get three percent of his vote for the whole state?

MR. NILSON: No, no, of his area.

QUESTION: Well --

MR. NILSON: He is running a lower level --

QUESTION: -- it is a smaller number of votes.

MR. NILSON: That's correct, but he is running a different level of campaign. This Court indicated in Storer that for a presidential candidate in California, that it was not unreasonable to require him to gather 14,000 signatures a day. And the Court essentially said when you are running for a big office in a big area, you've got to have the campaign organization that is going to be necessary and it is going to allow you to undertake that kind of an effort.

He was running for statewide office or for a statewide nomination or ballot position. Mr. Bradley was running for an important position here and I think he is required to undertake a significant effort to comply with the law. I don't think the law imposes unreasonable requirements on him.

Thank you.

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

Mr. Brown.

ORAL ARGUMENT OF JON T. BROWN, ESQ.,

ON BEHALF OF THE APPELLEES

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

My name is Jon T. Brown, and I am representing the appellee Bruce Bradley in this proceedings. Just as a brief preliminary matter, with respect to the jurisdictional statement to which Mr. Nilson referred in the case of Auerbach v. Mandel and that reference to what was in the jurisdictional

statement, I think it might be helpful for the record to point out that it was not indeed the state's position that a constitutional issue was raised in Auerbach v. Mandel. Quite the contrary, it was the state's position in their motion to affirm that no constitutional issue was raised in Auerbach v. Mandel. They indicate quite specifically in their motion to affirm that the entire matter was decided as a matter of statutory construction, and that of course is precisely what Judge Winter determined initially in Auerbach v. Mandel and determined once again in the decision of the three-judge district court in these proceedings.

With respect to the matter of the substantiality of the burden and the parity among the various candidates, both independent and primary party candidates or principal party candidates, I believe that there is another matter which has pervaded these proceedings and that is the question of parity, the question of whether or not ineed independent candidates are treated the same in the State of Maryland as are partisan party candidates. And it is a matter which was raised before the three-judge district court and is a matter which is raised, which has been raised here today. And I think the conclusion is inescapable, that there is no parity, there is no fairness between the way the parties, the various candidates are treated.

In effect, the independent candidate's primary

election ends 70 days prior to the partisan party candidate's primary.

QUESTION: He is a sure winner.

MR. BROWN: Beg pardon?

QUESTION: He is a sure winner, he is not in a primary contest then, it is not a primary election, he is on the ballot.

MR. BROWN: He is on the ballot providing that he has been able to obtain the three percent which in 1976 was 51,000 votes.

QUESTION: Right, contrast with somebody who goes into a primary election, he is competing for votes against one or more other people in the party primary, he might get 40 percent of the votes.

MR. BROWN: That's correct.

QUESTION: And still lose.

MR. BROWN: And he is competing, I might suggest, in a climate in which the political aspects of the campaign are very much heightened, media attention is heightened, and he is competing in an arena which he has chosen to compete in.

QUESTION: I thought that Jenness v. Fortson, if it stood for anything, stood for the proposition that the Constitution does not require a state to treat candidates, independent candidates and those who enter a primary election the same.

MR. BROWN: I think that's correct.

QUESTION: I thought it said that sometimes nothing can be more unfair than treating things that are not the same as though they were the same.

MR. BROWN: I think that is correct, Your Honor. However, in this instance there is a question that goes far beyond the question of parity among the candidates but rather that in addition the question of substantiality of the burden upon the independent candidate, which goes precisely to that synergistic effect between the amount of signatures which are required to be obtained by the independent candidate and the remoteness from both the primary filing deadline and the general election deadline which an independent candidate must reach.

Contrary to the situation in Jenness, the situation in the State of Maryland provides that, as was indicated in the record below, a primary filing deadline -- pardon me -- an independent candidate filing deadline which is on March 8th provides very, very substantial burdens for a party seeking access to the ballot by the independent process route. The record is replete with uncontradicted testimony that the independent candidate faced insurmountable difficulties at that stage of the process in getting his name upon the ballot.

Under such a circumstance, this Court has held on numerous occasions -- Buckley v. Valeo, in Storer v. Brown --

that the exacting scrutiny test is that test which must be applied, and under those circumstances the exacting scrutiny test being applied, if that is applied in these instances then the question of compelling state interest becomes immediately before the Court.

Compelling state interest here have been found by the court below to be insubstantial. Those which have been raised subsequent to the decision of the court below we have treated with on brief. And while they are indeed raised by the state as compelling state interests, there does not appear to be anything in those which have been raised which are compelling in the true sense of the word, that they could not be dealt with in less restrictive means which this Court has mandated in Dunn v. Blumstein and similar cases.

For example, as this Court recognized the plan which we have submitted or which we have suggested to the Court and which was in effect adopted by the court below deals we believe with all of the issues which the state has raised in raising the issue of compelling state interests, and also provides parity of access for independent candidates and removes the substantiality of the burdens which independent candidates face, particularly in presidential election years. It was adopted essentially by simply providing that on the filing date, that mutual filing date which all the candidates have, which in this instance was March 8th, that all of the candidates

file their petitions and our suggestion was and as adopted by the court that with a nominal but not insubstantial number of petitions, petition signatures, and between the time of the filing date and the primary date, that all of the party candidates and all the independent candidates engage in the same kind of open discussion of the issues which the state has suggested are necessary in order to provide each with access to the ballot in a comparable fashion.

So that during that period when the media interest is heightened, when weather conditions are far substantially improved in most instances, when the issues of the campaign are beginning to crystallize, and when voter interest is reaching its peak, that each of the candidates, both partisan candidates and independent candidates, will have an opportunity of access to the ballot.

We believe this is a way or perhaps the best way in this instance in which the Court can create -- can alleviate the substantial barriers which exist in the State of Maryland because of the remoteness of the filing deadline and still maintain and protect whatever compelling state interests truly exist in these situations.

QUESTION: You are not suggesting that a state has an obligation to do it the best way, are you?

MR. BROWN: No, Your Honor, I'm not. I'm suggesting that in this instance the burdens placed upon independent

candidates because of the remoteness of the deadline as found in Salera and as summarily affirmed by this Court were found to be so substantial that they were found to be contrary to the First and Fourteenth Amendments. And I would not suggest that --

QUESTION: What part of the First and Fourteenth Amendments?

MR. BROWN: I beg your pardon, Your Honor?

QUESTION: What part of the First and Fourteenth Amendments? Each one of those amendments contain a good many subjects.

MR. BROWN: Yes. The First Amendment, Your Honor, with respect primarily to the issue of freedom of association, the question of -- and the right to vote as that is maintained and encompassed within freedom of association which is guaranteed by the First Amendment.

The Fourteenth Amendment, that of equal protection which to some extent focuses more directly upon the candidate rather than upon his supporters, but the right of equal protection of the laws, that he not be discriminated against as far as access to the ballot is concerned.

QUESTION: Vis-a-vis those who enter the party primaries?

MR. BROWN: Vis-a-vis those who enter the party primaries, yes, Your Honor.

QUESTION: And the association or the First Amendment's associational right is the right of his supporters to effectively associate in order to try to elect him, is that it?

MR. BROWN: Yes, Your Honor, effectively associate at a time which is meaningful, at a time which they can become aware of the fact that he is a candidate, that they can become aware and participate in the process of getting additional supporters to support that candidate, at a time which does not discriminate against their ability to permit him access to the ballot just as a primary candidate is not discriminated against at the time that the heavy media coverage is occurring during a primary campaign.

With respect to the matter of Hicks v. Miranda, we would strongly disagree with the state that the court below misapplied Hicks v. Miranda. Indeed, quite the contrary, we think that the court below has applied Hicks v. Miranda in precisely the way which this Court has mandated in that decision and in Tully.

QUESTION: Well, whether the court did or didn't give too much weight to the summary affirmance in the Pennsylvania case is of little moment now that the case is here, this case is here, isn't it?

MR. BROWN: That is correct, Your Honor, but --

QUESTION: It is here to be decided on the merits?

MR. BROWN: Yes, it is, Your Honor, that is correct. And we would certainly concede that it is here to be decided on the merits, however, with respect -- if the Court has concerns with respect to Hicks at this point, we would suggest that the court below properly applied Hicks, and indeed that as an adjunct to that proposition, the court below made the extensive findings of fact which were necessary in order to determine that the burdensome nature of an independent candidate's race were processed to the ballot in Maryland, and also made without, it indicated, without extensive findings of fact, made the finding independent of Hicks, independent of Salera, that those substantial burdens were sufficient in and of themselves to be violative of the First and Fourteenth Amendments.

QUESTION: In any event, the three-judge court in this case held that the summary affirmance in the Salera case was of controlling authority, and whether it was right or wrong, it is now to be decided here as an independent matter, isn't it?

MR. BROWN: It is an independent matter, Your Honor, yes, that is correct. However, there are conflicting statements in the statement of the court below. At one point it indicates that legally they felt bound by Salera; at another point it indicated that they had made an independent finding independent of Salera.

But regardless of Hicks, as Your Honor has pointed

out, the case is here to be decided upon the merits and, as a part of the consequence and as a part of those factual matters which must be taken into consideration are the findings we believe of the court below with respect to the uncontradicted testimony of the individuals who participated in the process of attempting to get Mr. Bradley on the ballot. And as Mr. Nilson has indicated, those findings were uncontradicted with respect to the burdens which were faced by the campaign organization at that time of remoteness from the general election deadline and the primary deadline. And the standing by themselves, the court below has indicated, provide the substantiality of burden which then makes it incumbent upon the state to determine whether or not it has a compelling state interest and, of course, incumbent upon this Court to determine whether that compelling state interest is sufficient.

With respect to the question of whether or not as one of the compelling state interests which were raised by the court -- by the state, pardon me, was the matter of validation and the matter that all primary candidates or all candidates should be known at the same time.

The state statute, the State of Maryland has a statute which requires that that time be determined within 35 days. However, the experience is quite the contrary in particular instances. In some instances, for example, in Baltimore City, that determination of validation of signatures

can be made as rapidly as five days and was in fact made as rapidly as five days. And certainly when it comes to the constitutional rights of an individual and of his supporters for association, whatever burden the state may face with respect to its administrative burdens for validating signatures is no greater than whatever administrative burdens it may face for counting election ballots, certain election ballots in a contested election.

In summary, we would suggest that the court below was absolutely correct in its finding of the substantiality of the burden to the ballot faced by the independent candidate in Maryland, that the history of that balloting, of that polling in the State of Maryland has determined precisely that it is very difficult indeed for a statewide candidate to achieve access to the ballot, and that in order for, if there are compelling state interests, in order for those compelling state interests to be given whatever recognition, they must be given in the least possible restrictive way. And the plan which was suggested by Mr. Bradley to the court below and which was adopted by the court below is precisely that plan which best effects the compelling state interests.

The test of experience is perhaps as important as any. Mr. Bradley was afforded access to the ballot. He was defeated in the general election, but nevertheless none of the nine proffered state compelling interests were in any way

threatened or impinged upon by the process which was devised by the court below and the process by which Mr. Bradley was afforded access to the ballot and participated in the general election process.

QUESTION: Are you suggesting that was a test?

MR. BROWN: I would not, Your Honor, suggest a test of experience, but we have in this case the unique opportunity of hindsight to determine whether or not the compelling state interests which are proffered by the state are indeed compelling state interests, whether or not they are interests which can be accommodated by less restrictive means.

Thank you very much.

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

[Whereupon, at 1:42 o'clock p.m., the case in the above-entitled matter was submitted.]

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