ORIGINAL

In the

Supreme Court of the United States

THE ILLINOIS STATE BOARD OF ELECTIONS, DEFENDANT-APPELLANT, V. SOCIALIST WORKERS PARTY, ET AL., PLAINTIFFS-APPELLEES. CONSOLIDATED WITH THE ILLINOIS STATE BOARD OF ELECTIONS, INTERVENING DEFENDANT-APPELLANT. V. GERALD ROSE, ET AL., PLAINTIFFS-APPELLEES, CHICAGO BOARD OF ELECTION COMMISSIONERS, ET AL., DEFENDANT-APPELLEE	)	No. 77-1248

Washington, D. C.
November 6, 1978

Pages 1 thru 41

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IN THE SUPREME COURT OF THE UNITED STATES

THE ILLINOIS STATE BOARD OF ELECTIONS, Defendant-Appellant, v. SOCIALIST WORKERS PARTY, et al., Plaintiffs-Appellees.	:	
Consolidated With	:	No.77-1248
THE ILLINOIS STATE BOARD OF ELECTIONS, Intervening Defendant-Appellant, v. GERALD ROSE, et al., Plaintiffs-Appellees, CHICAGO BOARD OF ELECTION COMMISSIONERS, et al., Defendant-Appellee	:	

Washington, D.C.
Monday, November 6, 1978

The above-entitled matter came on for argument at 10:50 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MICHAEL L. LEVINSON, ESQ., 100 N. LaSalle Street, Chicago, Illinois 60602; on behalf of the Appellant Illinois State Board of Elections;

JEFFREY D. COLMAN, ESQ., Jenner & Block, One IBM Plaza, Suite 4300, Chicago, Illinois 60611; on behalf of Appellees Gerald Rose, et al;

RONALD REOSTI, ESQ., Reosti & Papakhian, 658 Pallister Avenue, Detroit, Michigan 48202; on behalf of the Appellees other than the Chicago Board of Election Commissioners.

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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 No. 77-1248, Illinois State Board of Elections against Socialist Workers Party et al.

Mr. Levinson, you may proceed whenever you're ready.

ORAL ARGUMENT OF MICHAEL L. LEVINSON, ESQ.,

ON BEHALF OF THE APPELLANT

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

This case arises as a result of a special mayoral election held in the city of Chicago on June 7th, 1977.

The plaintiffs, appellees, alleged 10-2 and 10-3 of Chapter 46, Illinois Revised States, unconstitutionally deprive them of their equal protection of the laws.

In this case they required, due to the 5 percent minimum signature requirement, to obtain approximately 36,000 signatures while statewide candidates, independent, new political party candidates running for state office, need only 25,000 signatures.

The trial court below issued a permanent injunction against requiring more than 25,000 signatures for all future elections. The court of appeals affirmed the district court's opinion.

Notwithstanding the objection of the appellant, during the course of the proceedings, the U.S. Labor Party

entered into a private agreement with the Chicago Board of Elections Commissioners to further lower the signature requirements from 25,000 to 20,000, and to extend the filing period from 64 days before the election to 50 days before the election.

The court of appeals declined to resolve this latter issue on the grounds of mootness.

Appellant submits that, at its threshold, this case present serious threats to the viability of three established doctrines of this Court, stare decisis, summary affirmance and mootness.

With respect to summary -- I'm sorry. With respect to stare decisis, appellant submits that the issues involved in this appeal, namely, the discrepancy between 25,000 signatures required for independent and new political party candidates running statewide and the 5 percent signature requirement for all other offices in the state was presented in the jurisdictional statement in Jackson v. Ogilvie.

It was present to this Court. And we have at issue the same statute which was challenged in Jackson v. Ogilvie. We have the same defendant, which was sued in Jackson v. Ogilvie. We have the same office being sought, which is mayor.

And in essence we argue that the same statute is again being relitigated. We argue in our briefs that the principle of stare decisis, and the interests of uniformity

and predictability should have guided the lower courts into affirming the constitutionality of that statute.

We also suggest that the law of the case, although not on all fours necessarily, with thise case should be expanded to include a situation where an identical statute is being challenged and, in effect, we maintain the same script is being presented. The actors are different but the roles are the same.

We have an independent candidate running for mayor in the city of Chicago.

QUESTION: Was the case you're referring to a summary affirmance here?

MR. LEVINSON: Yes, sir.

QUESTION: And we've said, haven't we, that our summary affirmances are in our own jurisprudence entitled to less weight than a fully written out opinion for the Court?

MR. LEVINSON: No, sir. I do not construe that.

I have -- in this Court I have construed that summary affirmances have precedential value in that --

QUESTION: They do. All I'm suggesting is that whereas in Hicks against Miranda I think we said that they were binding on lower courts, lower federal courts. In cases like Edelman against Jordan we've said they were entitled to some weight but not the same weight that a fully written out opinion would be.

MR. LEVINSON: Mr. Justice Rehnquist, as I understand it, or as appellant is maintaining, that perhaps the ratio decidendi, or the rule of law which is to be gleaned from a summary affirmance is very diffucult in the absence of an opinion.

But as Justice White stated in Hicks v. Miranda, votes to affirm summarily and to dismiss for want of substantial federal question -- it hardly needs comment -- are votes on the merits of the case.

Lower courts are bound by summary decisions by this Court until such time as the Court informs them that they are not.

QUESTION: But you -- don't you at least agree that prior summary actions are not entitled to the same weight here, in this Court?

MR. LEVINSON: In this Court, yes, sir.

QUESTION: In other words, even though the lower court --

MR. LEVINSON: Yes, sir.

QUESTION: -- under Hicks is bound by it, when it gets here --

MR. LEVINSON: Yes, sir.

QUESTION: -- we can ignore it.

MR. LEVINSON: Hopefully not.

QUESTION: But we can.

MR. LEVINSON: Yes, you can. Of course you can.

QUESTION: Well, we can't -- maybe we're quibbling about words. We probably can't ignore it. We have to mention it.

But it has, as brother Brennan suggests, less precedential controlling weight here, in this Court.

MR. LEVINSON: Yes, in this Court, it does.

QUESTION: Than a fully developed court opinion in a case would have.

MR. LEVINSON: That's true.

For the appellees to succeed in this case, appellants submit, would require overturning the Jackson summary affirmance.

QUESTION: This is based not just on the fact that it is not a fully developed opinion necessarily, but it's a case that hasn't had plenary treatment with full briefing and oral arguments. And therefore, while we can ignore theoretically any opinion of the Court, we give less weight to the summary dispositions.

Isn't that the way you read Hicks v. Miranda? We're free to give less weight to it.

MR. LEVINSON: Mr. Chief Justice, as I read Hicks v. Miranda and the Mandel decision, that there is less constraint on this honorable Court to decide otherwise than were the case to receive plenary consideration.

But notwithstanding that point, you have a quote Mr. Chief Justice Burger, and I'd like to read from the quote in Torres v. New York State Department of Labor: when we summarily affirm without opinion the judgment of a three-judge court, we affirm the judgment but not necessarily the reasoning by which it was reached.

Therefore, what appellees are suggesting in this case is that the summary affirmance was nothing more than an adoption of the opinion of the lower court in Jackson v. Ogilvie.

What appellants are urging on this Court is that the same issue which is being raised in this litigation was raised in Jackson v. Ogilvie. It's part of the jurisdictional statement. It's part of the appendix of the U.S. Labor Party's brief.

Therefore, we could only assume that this Court considered it when it summarily affirmed Jackson v. Ogilvie.

QUESTION: Mr. Levinson, would you help me on that precise point?

You have said that the same issue was raised, which I take it means in the Jackson case there was an argument that not only the 5 percent was unreasonable, but the fact that the 5 percent in the city of Chicago produced a higher number than the 25 percent-- 25,000 in other parts of the state?

Was that precisely --

MR. LEVINSON: Yes it was, Mr. Justice --

QUESTION: You didn't quote that part in your brief. You just quote language that refers to the fact that the 5 percent goes to 58,000. You don't quote anything that refers to discrepancies between 58,000 and 25,000.

MR. LEVINSON: As I recall, Your Honor, in our briefs we do maintain that the issue was presented --

QUESTION: You say that, but you don't cite anything in the jurisdictional statement that supports your statement. That's what puzzled me.

MR. LEVINSON: I think we cite it in the briefs.

QUESTION: What part of your brief?

MR. LEVINSON: No, it was more than one sentence. Although the lower court --

QUESTION: The lower -- the district court here said there was only one sentence, and it was only a passing mention, wasn't discussed.

MR. LEVINSON: That, with all due respect to the lower court, I think that is not a totally accurate statement. Because the later opinions of the court, he says, well, it was mentioned in passing in the brief. But attached is Appendix D to the U.S. Labor Party's brief, is the memorandum of the Attorney General of the State of Illinois, and this Court will note that it's more than just one sentence. It's a significant argument.

It was made both in the lower court and, we suggest, in this honorable Court, by virtue of the jurisdictional statement.

Now, even were this Court --

QUESTION: Mr. Levinson, it's really quite important that I do know exactly what you rely on.

You rely on Appendix D to the Labor Department's brief?

MR. LEVINSON: Yes, sir.

QUESTION: Which was an argument made in the United States District Court, as I understand it correctly.

MR. LEVINSON: But this was a --

QUESTION: Was there anything -- what was argued in this Court that is the same argument that is being made here today.

MR. LEVINSON: Well, this Court cannot grant plenary consideration. Therefore, the jurisdictional statement, which contained the memorandum of the attorney general, was an issue presented based on the documents of this Court in Hicks and Mandel.

It's an issue which has been presented to this Court --

QUESTION: Who advanced the argument in this Court that your opponents now rely on?

MR. LEVINSON: I'm sorry, Your Honor.

QUESTION: Who advanced the argument in this Court

in Jackson v. Ogilvie, that your opponents now rely on?

MR. LEVINSON: The appellants. Jackson attacked a memorandum of the attorney general to his jurisdictional statement, because he --

QUESTION: Did he make the argument, other than attaching a document that shows it was argued in the district court? Did he make the argument in this Court?

MR. LEVINSON: Well, by attaching it to the jurisdictional statement --

QUESTION: That's the extent of the argument that was made in the other case?

MR. LEVINSON: Because no plenary consideration was given.

QUESTION: Well -- all right. But that is --

MR. LEVINSON: Since no plenary consideration was given, the only way it could be presented to the Court --

QUESTION: I suppose the argument could have been advanced in the jurisdictional statement itself, and said, we think the decision is wrong for this reason.

But that was not done, as I understand it.

MR. LEVINSON: Well, there was a cross-over. It is stated in the jurisdictional statement that we are attaching the memorandum opinion of the attorney general. And it's incorporated within the jurisdictional statement. He attaches it as appendix B to the Jackson v. Ogilvie

jurisdictional statement. He says, for the reasons stated therein, we are including that as part of our argument.

So he is incorporating by reference the position of the attorney general, i.e., the discrepancy between statewide candidates and less-than-statewide candidates invidiously discriminates in violate of equal protection.

It's very clear from the jurisdictional statement, Your Honor.

QUESTION: I just don't understand, if it's that clear, why you didn't quote any of this in your brief.

I'll look at this jurisdictional statement --

MR. LEVINSON: Even if this Court were to conclude that the Jackson and Jenness decisions were not controlling, we further urge that this Court should find for appellants on the ground that the 5 percent signature requirement satisfies a compelling state interest.

The Jenness v. Fortson, appellant submits, is a watershed case where this Court upheld the satisfying the compelling state interest test a signature requirement of 5 percent of the registered voters, whereas in Illinois, it is 5 percent not of the registered voters but actually the voters who voted at the last general election. And normally voter turnout is 50 percent.

Storer v. Brown sustained a 5 percent signature requirement.

There is -- in the interest of doctrinal continuity that this 5 percent requirement which this Court has sustained be maintained.

In fact appellees are suggesting a chipping away of the 5 percent. And they rely on Lendall v. Jernigan. And appellant suggests that they are overstating their case.

In the Lendall v. Jernigan case, the state of Arkansas failed to satisfy -- according to this Court -- the compelling state interest test. It was a 10 percent requirement.

The Court did note that in the city of Little Rock, 50 signatures were required, whereas in a larger state senatorial district, more signatures were required.

But that was not the reason that the Court -- this Court, we suggest -- struck down Lendall v. Jernigan. The reason it was struck down was that 10 percent was too high. Illinois has 5 percent, which is not too high.

And most important the district court took 25,000 signatures and superimposed that as a maximum on the 5 percent signature requirement. We submit that there is no authority whatsoever for this.

This Court in Lendall v. Jernigan does not take the 50 signatures maximum for the city of Little Rock, Arkansas, and say that was the most signatures that would be required. You merely struck down the 10 percent signature requirement.

If I may now address myself to the question of

mootness: The resolution of the question of the authority of an election agency to lower signature requirements and extend the filing period is capable of repetition and evading review.

We maintain that a resolution of this question will determine the rights of the litigants, particularly the Chicago Board of Elections Commissioners.

They maintain that they have the right in special elections to deviate from the statute, to lower the statutory signature requirement, to extend filing dates. It brings in a personal factor.

Where the statute was universalistic and fair to everyone, they enter into a private agreement. And we feel that even though the election is over, based on this Court's decision in American Party of Texas v. White and Storer v. Brown, Moore v. Ogilvie, that this issue is still viable and that a -- and that the issue should be resolved.

QUESTION: You're not arguing for a consideration of the second issue that the court of appeals considered, the agreement between the Labor Party and the Chicago board, are you?

MR. LEVINSON: We are arguing that the doctrine of mootness has been given lip service by the lower courts, but that the issue is not moot, and that it should be remanded.

QUESTION: But the -- unless I've got the wrong brief here or something -- the Seventh Circuit did hold that

part of the case was moot.

MR. LEVINSON: That's right.

QUESTION: And you don't disagree with that?

MR. LEVINSON: Yes, we do.

We disagree with that portion of the Seventh Circuit opinion which held that the issue of lowering signature requirements in favor of one political party and not in favor of another -- the U.S. Libertarian Party sought to intervene and obtain ballot access with 18,000 signatures, and the court said no. The Chicago board didn't agree to 18,000 but they agreed to 20- for the U.S. Labor Party.

We felt that was an issue which was capable of repetition yet evading review and --

QUESTION: But the Seventh Circuit found otherwise, didn't it?

MR. LEVINSON: They did not resolve the issue on the ground of mootness. The declined to resolve it on that issue.

QUESTION: Well, they did not resolve the substantive issue --

MR. LEVINSON: That's right.

QUESTION: -- because they concluded it was moot.

MR. LEVINSON: That's correct, sir.

QUESTION: And isn't there some reason for us

thinking that the Seventh Circuit probably knows what the Cook County Board of Elections might do in the future better than we do?

MR. LEVINSON: No, sir.

I would say that that disqualification, removal from office, any number of contingencies, could cause another special election. And I don't think any of us can foresee the future.

I think it's a viable potentiality that may occur in the future and that the court of appeals would not necessarily know the motivations of the Chicago Board of Elections Commissioners.

And we--

QUESTION: Well, Mr. Levinson, if we agree with you that the courts of appeals of the Seventh Circuit was in error in considering this second issue moot, then we should do no more -- on that branch of the case -- than remand it to the court of appeals --

MR. LEVINSON: Yes.

QUESTION: --for decision on the merits, is that right?

MR. LEVINSON: Yes, sir.

QUESTION: We shouldn't attempt to decide the merits here?

MR. LEVINSON: Right, sir.

May I reserve the rest of my time?

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Colman.

ORAL ARGUMENT OF JEFFREY D. COLMAN, ESQ.,

ON BEHALF OF THE APPELLEES

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

If I may begin by trying to answer the question that Justice Stevens was concerned about.

In Appendix C to the brief of Appellee Gerald Rose, U.S. Labor Party, at page 19A in the appendix, in the pages listed at the top, this is the jurisdictional statement filed in Jackson v. Ogilvie by the appellants.

In this jurisdictional statement, as Mr. Levinson indicated, reference is made to the memorandum of law filed by the attorney general in the district court.

But if the Court will review page 19A, you'll see the context in which the reference is made to the attorney general's memorandum. The appellants in Jackson v. Ogilvie raised two questions in this Court: first, they questioned whether the 5 percent requirement for independent and new party candidates discriminated against those people vis-a-vis established political parties, Democrats and Republicans.

Second, they questioned whether the 5 percent requirement applied to independents and new political

parties in Illinois was more onerous than in other states.

And it's in that context that the appellants in Jackson v. Ogilvie said, for a most persuasive answer to the foregoing inquiry, it is respectfully suggested --

QUESTION: You are now reading from 19A?

MR. COLMAN: Yes, Your Honor.

QUESTION: About where on the page?

MR. COLMAN: Oh, about a third of the way down, two-fifths of the way down.

It is most respectfully suggested that this Court might properly look to and reasonably rely on the response and pleadings and memorandum of law filed by the attorney general.

That was the context of the reference in Jackson v. Ogilvie to the defendant's memorandum filed in the district court.

We submit, and we believe, that the opinions of this Court support this proposition, that it would cause chaos if district courts and state courts are forced to look to the record filed in this Court in order to determine whether a summary affirmance is binding on them.

Mr. Justice Brennan has spoken very persuasively to this matter on numerous occasions.

QUESTION: But that's been a dissent primarily, hasn't it?

MR. COLMAN: That's been a concurring opinion in

Mandel v. Bradley. And in Mandel v. Bradley the majority per curiam opinion supports that position as well.

QUESTION: Well, unless it's a 5 to 4 decision, per curiam opinion don't carry any weight.

MR. COLMAN: We would submit also that in Hicks v. Miranda the opinion of Mr. Justice White in which he indicates that those issues properly presented to this Court are the issues that are binding on lower courts insofar as summary affirmance is concerned.

It's hard for anyone to conceive that the segment on page 19Aon our brief, that which was filed in the jurisdictional statement in Jackson v. Ogilvie, properly presents to this Court the question that is before you today?

QUESTION: Which is what do you think?

MR. COLMAN: Which is whether section 10-2 and 10-3 of the Illinois election code, which require local candidates in Chicago and Cook County who are independents or new political parties to obtain far in excess of 25,000 signatures to obtain ballot placement, as opposed to a maximum 25,000 signature requirement for all other elections in the state of Illinios.

If I may by hypothetical give you what is the reality in Illinois. If I want to field an independent candidate for president of the United States, the attorney general of the state of Illinois, governor of the state of Illinois, or any

other office outside of Chicago, I can satisfy the state's needs by obtaining 25,000 signatures.

It's only --

QUESTION: Do you have to split them up among counties?

MR. COLMAN: No, Your Honor.

QUESTION: So that you could get 25,000 signatures in Cook County?

MR. COLMAN: The reality -- yes, Your Honor.

The reality is that 25,000 people can bind together in Cook County, or in the city of Chicago, and field an entire slate of candidates for statewide office, for President of the United States, for any office except those offices in Chicago where the 5 percent requirement would require them to get more than 25,000 signatures.

This is the absolutely irrational classification that is set forth in the statute.

QUESTION: I take it that Cook County is the only Illinois county in which this could happen?

MR. COLMAN: That's correct, Your Honor. That is correct.

In fact, the second most populous county in the state is Du Page County, and the 5 percent requirement in Du Page County would require 12,000 signatures.

The second most populous city in the state of Illinois is Rockford, and the 5 percent requirement there

requires 1,500 signatures.

QUESTION: Is that Rockford or Winnebago County?

MR. COLMAN: That's in Rockford city; the second most populous county is Du Page County.

QUESTION: Is Rockford bigger than Peoria?

MR. COLMAN: Excuse me?

QUESTION: Is Rockford bigger than Peoria?

MR. COLMAN: That's according to the 1970 census, Your Honor, which is the official census. In 1970, Rockford had 31,000 votes cast for mayor, and that was the second highest vote at that time.

I'm sorry, that was in the 1977 election, but the population was the second highest.

QUESTION: Well, let me go back once more, if I may, to pages 19A in Appendix D.

You pointed out that 19A doesn't articulate the argument that's being debated right now. I notice, however, on the last sentence of paragraph 2 on page 23A it does precisely identify the argument that you're making.

Now --

MR. COLMAN: And -- I'm sorry, Your Honor. Actually it's not a precise statement of the argument we're making.

In that memorandum on page 23A the attorney general is drawing a distinction between the requirements for independents in the city of Chicago and for new political

parties statewide.

Actually, that was a complete misstatement of what sections 10-2 and 10-3 require.

The proper articulation of the argument is that both independents and new political parties running in the city of Chicago are required to obtain more than 25,000 signatures. And both independents and new political parties running statewide need obtain no more than 25,000 signatures.

So if we're looking at page 23A, it does not ever literally or specifically state the argument that's before this Court. It misstates the law.

QUESTION: It does state a similar argument. Are they very close?

MR. COLMAN: It alludes to it, Your Honor, but --

QUESTION: What -- where did -- was Appendix D actually an appendix to the jurisdictional statement filed?

MR. COLMAN: It's my understanding that it was.

QUESTION: I see.

MR. COLMAN: I stated earlier that in our view, as well in the view of the district court and the court of appeals that this classification which requires independents and new political parties in Chicago, in Cook County, to obtain more than 25,000 signatures is irrational.

We, of course, maintain -- and the state board has never questioned us on this -- that rationality is not the

test to be applied by this Court. Fundamental rights are at stake in this case. The Court has long acknowledged that the fundamental right to vote and the freedom of association contained within the First Amendment support a compelling state interest test whenever the state attempts to classify and legislate in an area that would deprive people of access to the ballot.

QUESTION: Well, is your argument here limited to the comparison of this statewide offices --

MR. COLMAN: Yes, Your Honor.

QUESTION: Absent the 25,00 signature limit for -- in other situations -- would you be here?

MR. COLMAN: No, Your Honor.

QUESTION: You don't think the 5 percent requirement on its face, or in the context of Illinois politics is unreasonably burdensome?

MR. COLMAN: We thought that it was within the context of the special mayoral election held last year.

QUESTION: But not generally?

MR. COLMAN: Generally, this Court has upheld it. And while I disagree with the opinion in Jenness v. Fortson, I acknowledge that I would not --

QUESTION: Here you had only 81 days?

MR. COLMAN: That's correct, Your Honor.

QUESTION: But you're not arguing -- you're not

supporting the judgment on that ground here?

MR. COLMAN: That's not crucial to the Court. We would certainly assert it as an independent grounds for affirmance, and we do in a footnote in our brief.

QUESTION: Well I thought that that was what you concede was decided in Jackson v. Ogilvie.

MR. COLMAN: That was decided in Jackson v. Ogilvie, Your Honor, within the context of a general election.

QUESTION: Yes.

MR. COLMAN: And if I make this --

QUESTION: Which is simply an attack on the 5 percent requirement as such.

QUESTION: But there you had an unlimited time to get the --

MR. COLMAN: That's correct.

QUESTION: -- signatures, and here only 81 days.

MR. COLMAN: If I want to run for mayor of the city of Chicago in 1999, I can go out and start collecting my signatures tomorrow.

QUESTION: Do you expect to do that?

MR. COLMAN: No, Your Honor.

In this case, the state itself has determined that 25,000 signatures satisfy the state's interest in making sure that candidates for statewide office and for President of the United States have a sufficient modicum of support.

And if I may just again allude to something that Mr. Justice White said, in cases that followed Dunn v. Blumstein, this Court has upheld a 50 day durational residency requirement.

We would submit that if Illinois, for example, had a 50-day durational residency requirement, which was upheld by this Court, but then amended its statute to say that it would be 30 days for statewide offices, or 30 days for local offices, whichever it would be, the state would have an obligation to justify the discriminatory treatment.

It may be able to satisfy that obligation in certain cases. In this case, however, it has only stated that they need a sufficient modicum of support, and 25,000 signatures satisfied that requirement.

And with regard to the mootness claim, we believe that the Seventh Circuit Court of Appeals was correct. The case before the Court today is different from all of the other mootness cases that have come before this Court in the election context.

Those cases all involved continuing statutory enactments, where the statute itself would have effect in an election year, and after that, year after year after year.

The mootness question here is whether the state board of elections, and the city board of elections, have overlapping powers; whether the city board of elections properly entered into a settlement agreement that specifically

applied only to the special mayoral election back in 1977.

The Seventh Circuit Court of Appeals found that there was little likelihood of any recurring problem in this area, and therefore, dismissed the appeal on that question as moot.

If there are no further questions --

QUESTION: Could -- suppose we disagreed with -- well I'll put it this way.

Did the Court of Appeals rely at all just on the sheer burdensomeness of it, or did -- was its principal ground, or its only ground, the comparison?

MR. COLMAN: The court of appeals adopted equal protection analysis that the district court engaged in, and that was limited essentially to the disparity between 25,00 statewide --

QUESTION: Well, what if we disagreed with you? Wouldn't it be consistent with Storer in terms of burdensomeness, so shouldn't it be remanded?

We wouldn't decide that issue here.

MR. COLMAN: We would agree that it was burdensome, given the factual context, the limited number of --

QUESTION: Well, you would argue it was burdensome, yes.

MR. COLMAN: I'm sorry. Yes, we would argue that.

QUESTION: But that issue, I should suppose, should

be decided in the first instance in the lower courts.

MR. COLMAN: That was the issue that we entered into a settlement agreement on, Your Honor.

The way this whole thing came about --

QUESTION: Well, I know, but there's an permanent injunction outstanding.

MR. COLMAN: That's correct. And the permanent injunction says --

QUESTION: And the question is, should the permanent injunction be outstanding for a reason other tha n the reason given in lower courts?

MR. COLMAN: It should not. If this Court --

QUESTION: Well, I know, but shouldn't it be decided there first?

We shouldn't address the validity of the 5 percent requirement going on, should we?

MR. COLMAN: No, you should not. And the only basis for the permanent injunction was the district court's finding that the requirement that you obtain more than 25,000 signatures did not meet the state's necessary obligation, its obligation to show what is required to meet the constitutional and permissible standards.

QUESTION: Mr. Colman, under our practice, isn't it usual, if a court of appeals decides that an issue decided by a district court is moot, we don't simply dismiss the

appeal, but we direct that the complaint be dismissed?

MR. COLMAN: In this case, Your Honor, the only thing that was found to be moot by the court of appeals was the settlement agreement; not the -- there is a permanent injunction, as Mr. Justice White notes, that is in effect and is in operation, and tomorrow's election in Illinois, and in next year's election -- and that was based on the equal protection analysis.

Your Honor is correct in terms of what the law would be if the entire case was found to be moot.

QUESTION: Well, but this is half the case. This is a different issue than -- than the other half of the case. And the court of appeals found that this part of the case was moot.

MR. COLMAN: That's correct.

QUESTION: But because of the agreement that had been entered into.

MR. COLMAN: Because the election had passed. Because this was an agreement --

QUESTION: Oh, because the election had passed, and the usual capable of repetition principle didn't apply?

MR. COLMAN: That's correct.

QUESTION: Well then why shouldn't it have remanded with instructions to dissolve the injunctionand dismiss the complaint as to that aspect of the case?

MR. COLMAN: It could have remanded with instructions to dissolve settlement agreement, the order entered on March 17. But that order itself says that it applies only to the June, 1977, elections. It is of absolutely no precedential value, by its own terms.

I -- Your Honor is correct: That would be the normal process. But in this particular case, the order itself died in June of 1977. So there was no necessity for doing that.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Reosti.

ORAL ARGUMENT OF RONALD REOSTI, ESQ.,

ON BEHALF OF THE APPELLEES

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

It is my contention that there is basis for determining that the 5 percent requirement in Cook County and in Chicago in the context of Illinois politics, and in the context of the history of the Illinois election law, is too burdensome.

QUESTION: Well, now, do you suggest that that issue was decided in the court of appeals?

MR. REOSTI: No, I wouldn't suggest that, Your Honor.

QUESTION: Are you saying that we should decide it

if we can reject the equal protection argument?

MR. REOSTI: I'm saying if this Court decides to reject the equal protection argument that it can be decided on its face.

QUESTION: Well, I know we could, but --

MR. REOSTI: And should in this case.

QUESTION: -- a good part of that kind of a judgment is some feel for local politics.

MR. REOSTI: I think, Your Honor, that the 20 -- that the history of the application of the 25,000 signature requirement on a statewide basis provides this Court with ample basis for determining that given the effectiveness of the 25,000 signature requirement, that the additional burden, in light of the significance of that burden, would be clearly unnecessary.

QUESTION: Well, but the parties seem to have been able to satisfy it on prior occasions.

MR. REOSTI: I'm sorry.

QUESTION: The 5 percent, they've been able -- it hasn't proved intractable, has it?

MR. REOSTI: Your Honor, in Cook County, it has proved impossible.

In other words, no candidate, according to the record in this case, no candidate, whether a third party or an independent, has ever qualified for office in Cook County

by meeting the 5 percent requirement.

Furthermore, only one candidate in the history of the law, since 1931, prior to the decision below, only one candidate has ever qualified for office in Chicago by meeting this requirement.

So that if you take all the elections in Cook County and Chicago together, only once has anyone ever met that qualification. So it is a substantial burden.

When we look at the burden in terms of Cook County alone, the additional signatures required, just the increment alone, would equal 4 percent of the total electorate.

Now 4 percent, as we know, is very close to the maximum amount of signatures that this Court has ever said is permissible on the part of a state. So it's very close to the very maximum burden that this Court has allowed a state to impose on these very fundamental rights.

And yet this is just the increment alone. If we're going to look at the increment, we must look at the need for the increment. That need, it seems to me, has to be viewed in the context of the fact that the state of Illinois has fashioned a less drastic alternative for protecting its interests, which at least on a statewide level, has served those interests very well since 1931.

There is certainly nothing in the record to suggest that the application of the 25,000 maximum for a much larger

population has resulted in bedsheet ballots, has resulted in the inclusion of frivolous candidates on a statewide level.

QUESTION: What do you understand to be the justification offered by the state for a greater signature requirement in Cook County elections?

MR. REOSTI: None whatsoever.

They indicate that the only requirement for the 5 percent in Cook County is to test the fact that the candidate has a modicum -- they put it, has some community support. I assume that they mean a significant modicum of community support.

Certainly if a candidate on a statewide level with 25,000 supporters has a significant modicum of support, the interest must be the same, then a candidate in Cook County or Chicago with 25,000 supporters must, in terms of Illinois --

QUESTION: But you don't understand the state to have ever said more than that?

MR. REOSTI: I do not understand them to have ever said more than that?

QUESTION: Maybe an independent candidate in Cook County just needs a lot bigger base of support than a statewide candidate.

MR. REOSTI: He may need a lot bigger base of support to win, but he doesn't need a bigger base of support to become a legitimate candidate.

A legitimate candidate is a legitimate candidate. In the context of Illinois.

The difference between this case and Jenness is that the Court did not have before it a state-fashioned alternative as it does here.

The fact of the matter is that Illinois has said, this is the test that we're going to apply on a statewide basis to determine who is a serious, non-frivolous candidate.

QUESTION: Could a state say that in a large county we have, hypothetically, established political machines of the regular party, and an independent just doesn't have much of a chance there.

And so we're going to require more for him to run in that particular county or city than we would statewide where he -- an independent -- has a much larger base to draw on statewide?

It may be a rather cynical approach, but could a state say that for constitutional purposes?

MR. REOSTI: I don't think so, because it is cynical. And I think basically that when a state puts forth a reason for burdening the very important fundamental rights which are at issue here, that that interest that it puts forth has to be as -- has to not be cynical; has to be as real and concrete and related to its legitimate interests as the burden that it's putting in --

QUESTION: Well, it could be both cynical and real.

MR. REOSTI: Well, I don't see any relationship between any of the interests that this Court has indicated are legitimate state interests, which justifies burdening the fundamental rights at issue here, and the interest of insuring that somebody can get on the ballot, that they're going to win; which I take it is the essence of that argument.

I don't think the Court has ever gone that far.

QUESTION: Mr. Reosti, if I may ask you a background question.

When did this discrepancy in the statute arise? How long has this statute read this way? Do you know?

MR. REOSTI: It's read this way since 1931.

By the way, it should be noted that the state has twice in recent years had a chance to amend the statute and do something about the 25,000 signature requirement, and in each case they've kept it. They've kept the 25,000.

QUESTION: It's also rather interesting that -- I'm noticing this appendix D again -- the governor of Illinios and the attorney general of Illinois took the position the statute was unconsitutional, didn't they?

MR. REOSTI: That's correct. That's correct.

QUESTION: That's rather remarkable.

MR. REOSTI: Well, if there aren't any questions, thank you.

MR. CHIEF JUSTICE BURGER: Very well. Do you have anything further, Mr. Levinson.

REBUTTAL ARGUMENT OF MICHAEL L. LEVINSON, ESQ.,

ON BEHALF OF THE APPELLANT

MR. LEVINSON: With regard to the 5 percent signature requirement, it's not solely directed at Cook County. It is applicable at all 102 counties in the state in excess of 1,200 municipalities, 8,000 townships.

So it's not solely directed at the city of Chicago, or the county of Cook.

QUESTION: But the result of the statute is that in Cook County you need more signatures to run as a county-wide candidate than you do to run in the state of Illinois as a statewide candidate.

Now how does the state justify that?

MR. LEVINSON: It's -- I suggest that some historical staging is necessary in terms of a justification.

The approach taken by the general assembly with regard to statewide candidates is somewhat different with regard to any and all other candidates: local, township, county and so forth. It was both based on geographic considerations as well as signatures.

There was a requirement of 200 voters from at least 50 counties, plus 25,000 signatures.

This Court, in Moore v. Ogilvie, on the basis of

one-man-one-vote, struck down the 200 voters requirement.

The statute was amended, and it provided that not more than 13,000 signatures may come from any one county to be counted towards the 25,000 signatures.

In the case of Communist Party of Illinois v. State Board of Elections, the Seventh Circuit Court of Appeals, again on the basis of one-man-one-vote, struck down the 13,000 signature requirement.

Therefore, the 25,000 signatures is just a vestigial remnant of a plan which was based on geographic plus signature requirements; a totally different scheme than the 5 percent which was uniformly applicable to all municipalities, townships and counties.

QUESTION: You say if the courts had simply left the legislative plan alone from the beginning it would be a lot more rational than it is now.

MR. LEVINSON: Well, I believe Justice -- I better not guess. There was one justice who dissented in Moore v. Ogilvie, claiming that there was a rational basis for a geographic distribution, and there was a conflict of constitutional principles.

That was one of the justices of this Court.

We are only suggesting that the appellees are urging on this Court that a new classification be created; that in populous areas, less than 5 percent signatures be required, but

in rural areas, 5 percent be required.

So they are in fact urging a new classification.

If, in fact, 25,000 becomes superimposed as a ceiling, because then you only need 2 or 3 percent --

QUESTION: Well, would you -- you think you just have to go about it by percentages?

MR. LEVINSON: Yes, I think if the general assembly had struck 25,000 and made 5 percent the minimum signature requirement for statewide candidates, we wouldn't be here today. Based on Jenness, based on the recent decisions of this Court --

QUESTION: Well, I know. But the state has said -- it has said 25,000 is enough for statewide.

MR. LEVINSON: That's right.

QUESTION: And why isn't that enough in Cook County?

MR. LEVINSON: Because in all other areas --

QUESTION: What justification do you have for the decision?

MR.LEVINSON: I have no justification other than there were two different legislative schemes, one based on geographic support and signature requirement, and for all --

QUESTION: And a percentage.

MR. LEVINSON: And a percentage -- well, no percentage statewide. For all other units of local government, and townships and counties, it was 5 percent.

Two separate schemes. Through court action the one-man-one-vote principle has eroded away the bulk --

QUESTION: How long has the 5 percent requirement been --

MR. LEVINSON: It's been there a number of years; a number of years.

QUESTION: What was the 1931 date that someone mentioned?

MR. LEVINSON: That was the 25,000 signature requirement.

QUESTION: And has the 5 percent been as --

MR. LEVINSON: Almost as long, yes, sir.

QUESTION: What would have been -- how many signatures would the 5 percent have amounted to in 1931?

MR. LEVINSON: I don't have those figures; I'm sorry.

QUESTION: It might have been less than 25-.

MR. LEVINSON: It might have been.

Yes, sir.

QUESTION: My question was, they took all this time to legislate it, debating they could change it.

MR. LEVINSON: They could have changed it, and they could have increased --

QUESTION: They could have prevented us from destroying it all.

MR. LEVINSON: That's true.

I have only one short point to add.

With regard to the facts in this case, the signature requirements in Jackson v. Ogilvie were 60,000. In this instant case, there were only 36,000.

There was a restriction on signers of petitions of independent and new political parties that they must not have voted in the previous primary. Section 10-4 of the election code was amended, and there is no longer a restriction.

The facts are much more favorable to the state in the context of this case than in Jackson v. Ogilvie.

QUESTION: What was your position in Jackson v. Ogilvie?

MR. LEVINSON: We were not created. There was no State Board of Elections at that time.

QUESTION: Did the state take a position?

MR. LEVINSON: Yes, they argued against the constitutionality of the act, and this Court did not accept that argument.

There was no fact finding done by the lower court. We were denied a hearing, in violation of rule 65. Questions had been propounded by this honorable Court as to what has been the history? How many candidates have been allowed on -- new political party candidates and independents?

And certain statements have been made. I would ask that the Court treat those statements with caution. They are

outside the record, and what we requested and never received was a hearing wherein the plaintiffs would have been required to put on a case to show that they couldn't have made the signature requirements, and what the history was.

And to our knowledge, minor political parties have gained access to the Chicago ballot, as well as independent candidates in the past.

QUESTION: Well, you're telling us that no hardship was shown?

MR. LEVINSON: Exactly.

QUESTION: No basis for any conclusion on that?

MR. LEVINSON: Right. The burden was shifted, Mr. Chief Justice, to the state board to prove its case when the plaintiffs never had to prove their case whatsoever in terms of showing any restrictions; in terms of the time period.

The environment had significantly changed since Jackson v. Ogilvie, we believe in favor of the appellees.

And unless there are questions from the Court, I'd like to thank you.

QUESTION: Incidentally, I was a dissenter in Moore against Ogilvie.

MR. LEVINSON: Yes, I wanted to --

[Laughter.]

MR. LEVINSON: Okay, you felt that there was a --

QUESTION: Mr. Justice Harlan joined me.

MR. LEVINSON: Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:35 a.m., the case was submitted.]