

ORIGINAL
OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1635

TITLE JOHN B. ANDERSON ET AL., Petitioners v. ANTHONY J.
CELEBREZZE, JR., SECRETARY OF THE STATE OF OHIO

PLACE Washington, D.C.

DATE December 6, 1982

PAGES 1 thru 52

AR
ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - x

3 JOHN B. ANDERSON ET AL., :

4 Petitioners, :

5 v. : No. 81-1635

6 ANTHONY J. CELEBREZZE, JR., :

7 SECRETARY OF THE STATE OF OHIO :

8 - - - - - X

9 Washington, D.C.

10 Monday, December 6, 1982

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:03 o'clock a.m.

14 APPEARANCES:

15 GEORGE T. FRAMPTON, JR., ESQ., Washington, D.C.; on
16 behalf of the Petitioners.

17 JOEL S. TAYLOR, ESQ., General Counsel, Office of the
18 Attorney General, Columbus, Ohio; on behalf of the
19 Respondent.

20

21

22

23

24

25

1	<u>C O N T E N T S</u>	
2	<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
3	GEORGE T. FRAMPTON, JR., ESQ.,	
4	on behalf of the Petitioners	3
5	JOEL S. TAYLOR, ESQ.,	
6	on behalf of the Respondent	24
7	GEORGE T. FRAMPTON, JR., ESQ.,	
8	on behalf of the Petitioners - rebuttal	49
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in Anderson against Celebrezze.

4 Mr. Frampton, you may proceed whenever you are
5 ready.

6 ORAL ARGUMENT OF GEORGE T. FRAMPTON, JR., ESQ.,

7 ON BEHALF OF THE PETITIONERS

8 MR. FRAMPTON: Mr. Chief Justice, and may it
9 please the Court, this case involves the
10 constitutionality of Ohio's early filing deadline for
11 independent candidates as that provision is applied to
12 independent Presidential candidates.

13 The statute requires all independent
14 candidates seeking ballot access in November to file a
15 declaration of candidacy and 5,000 petition signatures
16 of Ohio registered voters at least 75 days before Ohio's
17 early June primary, which in 1980 was March 20th.
18 Primary partisan candidates seeking to run in the
19 primaries, party primaries, also must file by this same
20 date, but partisan Presidential candidates need not file
21 for or run in Ohio's Presidential primaries in order to
22 get on the ballot in November.

23 Under Ohio law, both minor party and major
24 party candidates, if selected by their parties some time
25 before late August, will appear on Ohio's ballot

1 regardless of whether those candidates were declared
2 candidates in March or April or May, regardless of
3 whether they ran in Ohio's primary or any other primary,
4 regardless of whether they came into Ohio or did
5 anything in Ohio prior to August.

6 Now, in the winter and spring of 1980,
7 Congressman John Anderson was a Republican candidate for
8 the nomination of the Republican Party as President of
9 the United States. When it became clear that his
10 support was coming not so much from Republican Party
11 regulars as from more or less equally Republicans,
12 Democrats, and independents, on April 24, 1980, he
13 announced that he was abandoning his Republican quest
14 and would seek to become an independent candidate
15 nationwide.

16 QUESTION: This was about 30 days or so after
17 the filing deadline?

18 MR. FRAMPTON: That's correct, Mr. Chief
19 Justice.

20 That same day, April 24, he also notified the
21 Respondent in this case, the Secretary of State, that he
22 was timely withdrawing from the Republican primary in
23 Ohio, in which he was entered, and the state has
24 stipulated and conceded from the beginning of this
25 lawsuit that Anderson's timely withdrawal from the

1 Republican primary in Ohio means that he was not barred
2 from getting on the general election ballot by Ohio's
3 so-called sore loser statute.

4 QUESTION: Do you think it makes any
5 difference that he had filed once under a party
6 designation and then sought to file later as a third
7 party candidate?

8 MR. FRAMPTON: In this case, Mr. Chief
9 Justice, I don't think it makes any difference, because
10 the Ohio legislature has already made a judgment about
11 whether that would disqualify a person in Mr. Anderson's
12 position from getting on the general election ballot.
13 That judgment is reflected in its sore loser statute,
14 3513.04, which provides in substance that someone who
15 loses the primary, party primary, cannot thereafter run
16 as an independent, and in a specific withdrawal statute
17 providing -- that applies specifically to Presidential
18 primary candidates, that holds that a Presidential
19 candidate who withdraws from a Presidential primary is
20 entitled to do that within 30 days of the party primary,
21 which would be early May, and the state has stipulated
22 that by virtue of that timely withdrawal, the sore loser
23 ban didn't apply to him.

24 After this notification on April --

25 QUESTION: Yes, but that person would have had

1 to have filed or made his intentions to run in the
2 primary known before his withdrawal. He couldn't
3 withdraw if he wasn't running.

4 MR. FRAMPTON: That's correct, Justice White.

5 I think the point is that the sore loser
6 statute, that is, the statute that directs itself to the
7 question of whether a candidate has previously sought to
8 gain the party nomination is -- expresses a very
9 different state interest than the filing deadline, and
10 the filing deadline is a much more burdensome provision,
11 because it bars all independent candidates and all
12 independent-minded voters after March 20 from putting
13 forward an independent candidate, whereas the sore loser
14 provision applies only to individual candidates, and
15 doesn't bar the voters from putting forward another
16 independent until some time very late in the summer.

17 QUESTION: Mr. Frampton, exactly what is the
18 First Amendment right being asserted here?

19 MR. FRAMPTON: Justice --

20 QUESTION: How would you articulate it?

21 MR. FRAMPTON: Justice O'Connor, I think it is
22 directly the First Amendment right of the -- principally
23 being asserted in this case is the right of the voters
24 and citizens, including those petitioners who are Ohio
25 registered voters who are seeking to support Congressman

1 Anderson by putting forward his name and having him on
2 the ballot, their right to associate for the purpose of
3 putting their candidate before whatever body the state
4 designates to select its electors in November.

5 And in addition, I think what this Court has
6 recognized in many cases as an intertwined but somewhat
7 separate right to vote which is not found as such in the
8 Constitution, but I think this Court has recognized is
9 fundamental to the democratic process, and is important
10 if any of the rights in the Constitution --

11 QUESTION: Does Ohio permit write-in
12 candidates?

13 MR. FRAMPTON: Yes, it does, and there is a
14 specific provision in the Ohio code for Presidential
15 candidates. You can qualify as a write-in candidate if,
16 prior to, I believe it is 40 days prior to the general
17 election, you file a slate of electors with state
18 officials.

19 QUESTION: Well, then, how is the right to
20 vote infringed?

21 MR. FRAMPTON: Justice O'Connor, I think the
22 Court has recognized in the past, for example, in Lubin
23 and Panish, that the write-in -- and in Williams and
24 Rhodes, that the write-in alternative is not an
25 equivalent, a practical equivalent either for voters or

1 for candidates to having a candidate's name on the
2 ballot, and I would contend that that is particularly so
3 for someone seeking as important an office as President
4 of the United States.

5 I think the reason for that is that the
6 write-in alternative and the ballot access alternative
7 serve very different purposes. The state is saying to a
8 candidate and to his or her supporters, if you can
9 demonstrate substantial community support, you are
10 entitled to have your name printed on the ballot.
11 Perhaps the major party candidates get some ballot
12 preference, but the independent's or third party
13 candidate's name will be on the ballot.

14 The state is also saying by the write-in
15 alternative, we are not going to totally bar everyone
16 else. In other words, regardless of whether you have
17 any community support, we will allow people to write
18 your name in if you simply go through some
19 administrative -- jump through some administrative hoops
20 near to the election.

21 So they are two very different things.

22 QUESTION: Well, you are not relying really on
23 some right to be a candidate, then.

24 MR. FRAMPTON: Justice O'Connor, I think we
25 are certainly asserting the right of Petitioner John

1 Anderson to be on the ballot and to represent these
2 people. His rights --

3 QUESTION: Do you think that Clements versus
4 Fashing bears on that, where the Court indicated there
5 wasn't such a right?

6 MR. FRAMPTON: Justice O'Connor, I think the
7 Court treated that case as principally a case asserting
8 the candidate's rights, and although we do have a
9 candidate here asserting his rights, I think that the
10 principal rights being asserted here are those of the
11 other petitioners and voters and citizens like them.

12 QUESTION: Well, if we have said there isn't a
13 right under the First Amendment to be a candidate, then
14 can the voters have some right that hinges on some right
15 to be a candidate?

16 MR. FRAMPTON: I think it does, but I think
17 the voters also have an independent right. The voters'
18 rights that are being infringed here are the rights of
19 independents and other voters to have the opportunity
20 during this five-month period when party supporters have
21 an opportunity to react to political events and other
22 candidates' choices, and in late August to be able to
23 choose that candidate who is going to have the best
24 chance to win.

25 It is the discrimination between the rights of

1 those voters to put forward a candidate, the party and
2 the independents. Now, the state says that is really
3 very theoretical, but I think that you can take any of
4 the examples that we have cited in our brief from
5 political history and demonstrate that the same thing
6 could happen in 1984, that would discriminate against
7 the independent voters.

8 For example, in 1968, Lyndon Johnson shocked
9 the country by announcing in late March that he was not
10 going to run for re-election, and indeed his principal
11 opponent at that time, Senator Robert Kennedy, who had
12 only declared two weeks earlier, was assassinated in
13 early June. Those events totally changed the political
14 calculus.

15 Now, given our present economic situation and
16 the age of our incumbent President, it would be no more
17 shocking if President Reagan were to announce on April
18 24, 1984, that he had decided not to run for
19 re-election. If that happened, party voters and party
20 supporters would have months to react and still choose
21 in late August the best candidate based on that set of
22 political circumstances, but what about voters who
23 elected President Reagan in 1980 because of, say, his
24 views on supply side economics, his conservative
25 political ideology?

1 Those people who assumed on March 20, 1984,
2 that their interests would be represented in the general
3 election, because they would vote for President Reagan
4 for re-election, now, if the Republican Party were not
5 going to nominate someone who met their political views,
6 they would be forever frozen.

7 QUESTION: Well, what business would those
8 people have for assuming in your hypothetical situation
9 that President Reagan would run again. If he simply had
10 remained silent, and there had been no party
11 conventions. Those are the ones that nominate. They
12 are simply waiting like everybody else to see what
13 happens.

14 MR. FRAMPTON: I think that is precisely the
15 point that we are trying to make in our case. They have
16 no right to assume that. It is not possible to tell
17 prior to early summer in many election years who the
18 most likely candidates are going to be. Therefore,
19 there is no meaningful or realistic incentive for voters
20 to organize behind an independent candidate very early
21 in the year and find somebody who is going to expend the
22 necessary energy to go out there in January and February
23 and March with volunteers in 50 states and get on the
24 ballot.

25 QUESTION: Yes, but the logic of your position

1 suggests that if the major party conventions were held
2 in late August and September, and the candidates
3 nominated only then, and although that isn't the
4 tradition, there is certainly nothing in the law that
5 prevents it, your people would still have a right after
6 that happens, however late or however few days left
7 before election, your people would still have a right to
8 act after the major parties in order to put their
9 candidate up, and I don't see where you get that out of
10 our cases.

11 MR. FRAMPTON: Justice Rehnquist, I don't
12 think that is at all the necessary logic of our
13 position. Our position is only that the state should
14 not be permitted to very substantially burden and
15 discriminate against independents by making them qualify
16 much earlier than the party candidates absent some state
17 interest that the legislature, state legislature has
18 considered and made a determined judgment it is really
19 necessary to impose this burden.

20 For example, administrative interests of the
21 state of Ohio on the face of its statute might well
22 sustain a filing deadline here in early June, several
23 months in advance of the party conventions, and indeed
24 this Court has sustained mid-June deadlines.

25 So we are not arguing that independents have

1 to be given the right to come after the party
2 selections. What we are saying is that when you have a
3 process that lasts, let's say, from January to August,
4 throughout the country, in 50 states, in which the
5 voters, party and independent voters, are engaged in
6 selecting the nominees to appear on the ballot, one
7 state should not be permitted discriminatorily to say to
8 independents alone that if you don't get into the race
9 at the beginning of this process, you are not going to
10 be able to get in at all.

11 I would like to point out that the court of
12 appeals here which reversed the district court appears
13 to have held that a very lenient standard of review is
14 appropriate. Although it is our position that the
15 decisions of this Court mandate strict scrutiny in this
16 case, we think that even with the most lenient standard
17 of review, that the statute doesn't pass constitutional
18 muster.

19 QUESTION: Well, in that regard, Mr. Frampton,
20 are you suggesting that without regard to how this
21 statute was applied to Mr. Anderson and his supporters,
22 the statute is unconstitutional on its face? Is that
23 your position?

24 MR. FRAMPTON: It is our position that it is
25 unconstitutional on its face as applied to the

1 Presidential race.

2 QUESTION: Well, how about as it is applied to
3 Congressman Anderson, in the particular circumstances of
4 his case, and if you say that -- if you -- let's just
5 assume that as applied in this case, it was
6 constitutionally applied. Just assume that. I take it
7 your position is nevertheless the statute should be
8 declared unconstitutional on its face because it might
9 be applied unconstitutionally in other circumstances.

10 MR. FRAMPTON: The assumption that the statute
11 -- that -- the assumption would be that Congressman
12 Anderson could constitutionally be barred from Ohio's
13 general election.

14 QUESTION: Yes, yes, the very case that the
15 statute was not unconstitutionally applied to him.
16 Assume that.

17 MR. FRAMPTON: But it seems -- sorry. It
18 seems to me that assumption would be that the state
19 could have passed some other law, such as a
20 disaffiliation provision, that would have barred it.

21 QUESTION: Well, that may be so, but what
22 about this law? It would nevertheless be
23 unconstitutional on its face?

24 MR. FRAMPTON: Well, our position, I think,
25 then -- my answer has to be twofold. One, this isn't a

1 disaffiliation provision. It is not a political
2 stability device. And second, that the state isn't
3 entitled to make it into something that it isn't. And
4 then, third, that --

5 QUESTION: Yes, but why would you -- why would
6 you -- why would you think you were entitled to have it
7 declared unconstitutional on its face, just because it
8 might be applied to others in an unconstitutional way?

9 MR. FRAMPTON: Well, I don't -- Mr. Justice, I
10 don't think that is the real thrust of the Court's
11 overbreadth opinions --

12 QUESTION: Well, I want to know what the
13 thrust of your position is.

14 MR. FRAMPTON: If Congressman Anderson, for
15 example, were contesting -- had been faced with an
16 850,000 petition signature requirement in June, which he
17 had challenged because he couldn't get the correct
18 number of signatures, I don't think that it would be
19 right to say that he wasn't entitled to challenge that
20 requirement because the state could have barred him with
21 some kind of political stability device --

22 QUESTION: I still -- I still want to know
23 whether we should judge this case -- we should ask
24 ourselves whether this statute was constitutionally
25 applied to Anderson in the circumstances of this case,

1 or whether we must also ask, well, that is sort of
2 irrelevant, is the statute unconstitutional on its face,
3 because it is overbroad, or because of something else.

4 MR. FRAMPTON: That is correct. Our position
5 has always been that it has to be considered in terms of
6 its impact on its face --

7 QUESTION: Well, not if the test is just mere
8 rationality. And you seem to -- I know you say it is
9 strict scrutiny, but --

10 MR. FRAMPTON: Well, our position is that even
11 if a rational relationship test is applied, the statute
12 falls, because it isn't -- it doesn't in fact rationally
13 further political stability goals. It doesn't, for
14 example, prevent a party candidate from running as an
15 independent. It doesn't -- the state doesn't prevent by
16 the filing deadline or any other provision a person who
17 has been a long-time independent from running in a party
18 primary, or a party member from running in another
19 party's primary, or a candidate from filing as an
20 independent in the Presidential race and going on and
21 continuing to run as a party candidate in every other
22 state in the country. So it doesn't in fact serve any
23 of the political stability purposes that this Court
24 outlined in upholding a one-year disaffiliation clause
25 for state races in Storer.

1 So it is just not that kind of device. It
2 seems to me that argument has to be premised on the
3 state's position that this isn't really a filing
4 deadline. It is something other than what it looks
5 like. It is a sheep in wolf's clothing, or a wolf in
6 sheep's clothing. And our position is, it is not. It
7 is just a filing deadline.

8 If you look at the legislative history, or how
9 the statute operates, or other ways in which you look at
10 a statute that looks like one thing which somebody says
11 is really something else, all of those show you that it
12 isn't something else in disguise, it is just a filing
13 deadline. Just a date by which a candidate must
14 demonstrate his community support.

15 In fact, the legislative history shows here,
16 if we have to go to that, that at best the statute is an
17 accident. It is something designed for statewide races
18 where the state can legitimately say everybody who wants
19 to get on the ballot has got to start out at the same
20 time, and nobody gave much thought to the fact that in
21 the Presidential context it is irrational.

22 At worst, it is a leftover part of an
23 exclusionary scheme that this Court recognized in
24 Williams and Rhodes.

25 I think that although a large part of our case

1 does turn on discrimination, that we would have an
2 equally strong case, and do have an equally strong case
3 simply flowing from the burden that the statute imposes
4 on independent candidates even absent the
5 discrimination. The burden that we argue is tied with
6 the discrimination, because it is a burden on the
7 competitive exercise of rights.

8 You can't just look at 229 days or 209 days.
9 You have to look at what independent voters can do
10 vis-a-vis what everybody else is permitted to do.

11 QUESTION: Mr. Frampton, is there any evidence
12 here that indicates how many late blooming third force
13 candidates like the Petitioner Anderson have sought and
14 been denied access to Ohio's general election ballot?

15 MR. FRAMPTON: There is evidence that a number
16 of independent Presidential candidates have gotten on
17 the ballot, but it is --

18 QUESTION: Is there any evidence as to how
19 many have been denied access?

20 MR. FRAMPTON: No, Your Honor, there is not.
21 It is stipulated in the record, I don't remember the
22 paragraph of the stipulation, that there was
23 insufficient information available from either the state
24 government's offices or from any other source that we
25 had available in the district court to make a

1 determination about that.

2 Even if Ohio had a non-discriminatory statute,
3 that is, even if we were facing a statute that applied
4 equally to --

5 QUESTION: When you say discriminatory, it
6 does, of course, it treats party people and independents
7 differently. Is that what you mean by discrimination?

8 MR. FRAMPTON: Yes.

9 QUESTION: Just that it -- you are not
10 suggesting that just because they are treated
11 differently, that the law is unconstitutional?

12 MR. FRAMPTON: No, we are suggesting that
13 because independent candidates and voters who may wish
14 to put forward some candidates are deprived of the
15 opportunity during most of the time everybody else
16 chooses their nominees from doing the same thing, that
17 that is both an invidious discrimination and a burden.

18 But even if the difference in treatment -- I
19 am sorry -- were absent from the case, I think we'd have
20 a strong case. It would be a different case to analyze,
21 because then the question would be, in the context of a
22 50-state process, where other states, voters in other
23 states are choosing the nominees, could Ohio alone take
24 the position that no candidate who had not thrown his
25 name into the ring as of March 20th was going to get on

1 Ohio's ballot regardless of who nominated him.

2 Now, I think if you look at it from that
3 context, that that would be a very, very substantial
4 burden, a substantial interference by Ohio in the
5 political process nationwide.

6 QUESTION: Of course, I think it is also true
7 that the Ohio -- it is inconceivable that the Ohio
8 legislature, with Republicans and Democrats making up 98
9 percent of it, would pass the statute.

10 MR. FRAMPTON: Absolutely. I am quite sure
11 that if they did, that I wouldn't be here alone today,
12 that the Republican and Democratic Party voters would be
13 here urging on you the proposition that this was a
14 massive infringement on their rights under Cousins and
15 Wigoda, but we all know that the states aren't going to
16 do that. They are not going to do it because they are
17 not going to buck the power of the two major political
18 parties, and all we are saying in this case is, fine,
19 but then the states should not be permitted, having made
20 that choice, to go ahead and just buck the independents
21 who simply because their supporters have chosen not to
22 affiliate with an ongoing political institution between
23 elections don't have the political organization to go to
24 the state legislature and say, don't do this to us.

25 QUESTION: But, of course, you -- in a sense,

1 you seem to be arguing that independents are a sort of
2 political party all their own, and of course if that
3 were true, I think there would be no difficulty about
4 Ohio saying that if you want the independent nomination,
5 you have got to file by a certain date, and the
6 independents choose their candidate at the independent
7 convention, and such and such.

8 But that really isn't what the independent
9 is. It isn't a third political party. It is just
10 people who don't affiliate with the two major parties,
11 and who kind of go in and out from one campaign to the
12 next.

13 MR. FRAMPTON: Justice Rehnquist, I think I
14 have to give a three-part answer to that question. I am
15 sorry.

16 QUESTION: I didn't realize I was bringing
17 that on.

18 (General laughter.)

19 MR. FRAMPTON: It seems to me that the Court,
20 although it is not a separate party, of course, the
21 Court has recognized in previous decisions that
22 independent-minded voters, those people who for whatever
23 reason don't want to affiliate themselves with an
24 organized ongoing political faction, do have different
25 and independent type of rights that are entitled to the

1 same recognition under the First Amendment as party
2 members.

3 Now, it is true here John Anderson certainly
4 was not running as the candidate of an independent
5 party. Indeed, his -- the information in the record in
6 this case indicates, and the district court found that
7 he was an unusual situation. He was drawing support
8 from the major parties and from this large group of
9 independent-minded voters whose size has increased over
10 the last decade or two.

11 But I think that their rights, the rights of
12 the independent voters, whether they are -- the rights
13 of those who want to put forward some alternative to the
14 major parties, be they independents or party members,
15 are the same if they are barred after March 20 in, for
16 example, putting forward a candidate should President
17 Reagan withdraw in '84.

18 QUESTION: But your argument necessarily
19 requires you to say, doesn't it, that even though the
20 major parties have their conventions in August, that
21 nonetheless if someone like Congressman Anderson wishes
22 to announce in September on the basis of choices made by
23 the major parties in August, Ohio has got to allow them
24 to do it, however it may foul up their balloting.

25 MR. FRAMPTON: No, our position still is that

1 the burden or difference in treatment, if it is
2 substantial, has -- simply saying that it has to be
3 supported by some state interest. Now, the state
4 obviously -- states obviously do have interests in
5 having filing deadlines earlier than the national
6 conventions.

7 Of course, most states do have filing
8 deadlines in September --

9 QUESTION: Would a filing deadline in June for
10 independents have done away with your constitutional
11 objections, do you think? Because the same sort of
12 thing that Congressman Anderson relied on in April could
13 have occurred as a result of the two major party
14 conventions in August.

15 MR. FRAMPTON: I think it would be a very
16 different case, because Ohio does have legitimate
17 administrative interests that might support a June
18 deadline. There would still be some burden and some
19 difference in treatment, albeit a lesser -- lesser
20 degree, and the state would have a real strong state
21 interest.

22 For example, it is stipulated here that even
23 independent Presidential petitions that are filed by
24 March 20 sit in somebody's in-box, or hopefully a safe,
25 gathering dust for three months, until mid-June. In

1 mid-June, the state does begin this process of exposing
2 them to public scrutiny, verifying them, and
3 entertaining challenges.

4 Now, I think if this were a June 12th
5 deadline, supported by a facially valid state interest,
6 then the only question -- the only kind of challenge we
7 could make really was to try to prove as a matter of
8 fact that the state really didn't need two and a half
9 months. Most states don't. Larger states than Ohio
10 don't. But that would be a pretty heavy burden on us.

11 CHIEF JUSTICE BURGER: Very well.

12 MR. FRAMPTON: Unless there are any further
13 questions, I would like to save the rest of my time.

14 CHIEF JUSTICE BURGER: Mr. Taylor.

15 ORAL ARGUMENT OF JOEL S. TAYLOR, ESQ.,

16 ON BEHALF OF THE RESPONDENTS

17 MR. TAYLOR: Mr. Chief Justice, and may it
18 please the Court, the Ohio filing deadline at issue in
19 this case has a burden, if it has one at all, of an
20 entirely different character than the election
21 regulations that have been struck down in the past by
22 this Court. It does not result in a prohibition of all
23 independent candidacies from the Ohio ballot, nor does
24 it make it virtually impossible for third party
25 candidacies, as was the case in Williams v. Rhodes, nor

1 does this filing deadline result in any class of voters
2 being totally prohibited from voting at all, as was the
3 case in Dunn against Blumstein, the Tennessee one-year
4 residency case, and Kramer against Union Free School
5 District, where classes of voters were prohibited from
6 voting at all in a particular election.

7 The burden of this statute is indeed even less
8 than the burden posed by statutes which have been upheld
9 by this Court. For example, this filing deadline does
10 not require the voter to make up his mind as long as
11 eleven months before an election how he wishes to
12 participate in that election, as was the case in Posario
13 against Rockefeller, in which a party enrollment statute
14 in New York was upheld that required enrollment as long
15 as eleven months before a primary election.

16 Nor does this statute require the candidate to
17 make up his mind as to how he wishes to participate in
18 an election as long as one year before that election, as
19 was the case in Storer v. Rhodes, in which a one-year
20 disaffiliation requirement was upheld.

21 Indeed, all this statute requires is that a
22 person seeking the office of President, an office for
23 which the campaigns frequently begin as long as two
24 years before the election, make up his mind seven and a
25 half months before that election that he wishes to seek

1 the office as an independent candidate. This, I would
2 submit, is not much of a burden.

3 I would like to stress three areas in my
4 argument. Number one, that there is no invidious
5 discrimination in this case between independent
6 candidates and the candidates of political parties.
7 Number two, the statute does not pose a substantial
8 burden upon any constitutional rights for the class of
9 independent candidates, and therefore strict scrutiny is
10 not appropriate. And Number three, it is in fact
11 supported by important state interests.

12 QUESTION: On your second point, do you say
13 the same thing about not only the candidate but about
14 his supporters?

15 MR. TAYLOR: Yes, I do, Your Honor. Of
16 course, any candidate restriction is going to have some
17 kind of an effect on voters, and I think --

18 QUESTION: I take it your opposition stresses
19 the associational right rather than the candidate's
20 right.

21 MR. TAYLOR: Right. The -- Any restriction on
22 a candidacy is going to have an effect on voters to the
23 extent that if the candidate does not comply with that
24 restriction, whatever it is, then his supporters will
25 have one less candidate available to vote for. In other

1 words, any candidate restriction is going to narrow the
2 field to some extent that the voter has available to him.

3 The Court has never held that that simple
4 narrowing of the field all by itself is enough to
5 establish an infringement of rights. Indeed, in *Bullock*
6 *v. Carter* which -- in which the issue was discussed
7 extensively, the Court in that case relied upon a
8 factual determination that indeed many, many candidates
9 had been kept off the ballot by the high filing fees in
10 the state of Texas that were not sustained in that case.

11 QUESTION: Well, then, you do recognize that
12 there is a right of political association that may be
13 affected, but you are just saying it isn't much of an
14 effect.

15 MR. TAYLOR: That's correct, Justice
16 O'Connor. Our position --

17 QUESTION: So there is some First Amendment
18 right here at stake which you would recognize,
19 apparently, as well.

20 MR. TAYLOR: There is no question but that the
21 Court in voting rights and candidate cases has
22 recognized the implication for First and Fourteenth
23 Amendment rights of any regulation. The simple fact,
24 though, that the regulation may affect such rights does
25 not, I would submit, result in an immediate leap to the

1 conclusion that the regulation must be justified by a
2 compelling state interest.

3 QUESTION: Well, there may be a threshold
4 inquiry of whether it is an undue burden or something of
5 that kind.

6 MR. TAYLOR: Indeed, I think that is the case,
7 Justice O'Connor, and in several cases the Court has
8 done exactly that. In Mandel against Bradley, for
9 example, in Storer v. Brown, both of which involved a
10 numerical petition requirement, in both cases there was
11 actually a remand made to the lower courts for the
12 express purpose of determining as a factual matter
13 whether that regulation was indeed burdensome.

14 QUESTION: Does any other state have a filing
15 deadline as early as Ohio's?

16 MR. TAYLOR: One state currently has a filing
17 deadline earlier than Ohio.

18 QUESTION: What is that?

19 MR. TAYLOR: I believe that is Indiana.

20 QUESTION: Indiana?

21 MR. TAYLOR: New Jersey, I believe, has one in
22 April, and there were, of course, at one time filing
23 deadlines in four other states at or about the same time
24 as Ohio's that were struck down as a result of Anderson
25 litigation in other cases. So that it would appear that

1 at least seven states are desirous of having a filing
2 deadline at or about this time. There are, of course,
3 many other filing deadlines in June and July that would
4 come much earlier than the second of the two national
5 conventions.

6 And I think indeed that Petitioners' position
7 does -- would in fact require, if sustained, the
8 invalidating of filing deadlines that came in advance of
9 the national conventions, because as I understand his
10 argument, it is clearly that the voters have a right to
11 coalesce around an independent candidate after the
12 issues have been determined at the convention, and after
13 the identities of the major parties' nominees are known.

14 So that I think the impact of this case would
15 be much, much broader than simply a filing deadline that
16 occurs in the spring.

17 Turning to the question of whether there is
18 invidious discrimination in this case, the Petitioner
19 argues that the discrimination to exist simply because
20 the independent candidate must file his petitions in
21 March, whereas the political parties remain free to
22 select their nominee up until as late as the conventions
23 in August.

24 There is a fundamental fallacy in making this
25 argument. There is an assumption that is not merited

1 that it is possible to compare political -- it is
2 possible to compare the candidates seeking the
3 nomination of a political party with independent
4 candidates. In Ohio, there are two entities that have a
5 right of access to the ballot, set by Ohio Revised Code
6 Section 3505.10.

7 One of those is a political party. The other
8 is the independent candidate. It is not the person
9 seeking the political party nomination that has that
10 right of access to the ballot. It is the party that has
11 that right of access. And both the independent
12 candidate and the political party must take steps no
13 later than March to qualify for the ballot. In the case
14 of the political party, it qualifies either by
15 attracting a certain level of support in the preceding
16 election or by submitting petitions with the signatures
17 of 1 percent of the people who voted in the last
18 election. In the case of the independent candidate, he
19 qualifies simply by submitting the nominating petition.

20 At that point in time, in March, then, when
21 both those entities have qualified, the only
22 difference --

23 QUESTION: When you say both those entities,
24 Mr. Taylor, what do you mean?

25 MR. TAYLOR: The two entities being the

1 independent candidate and the political party.

2 QUESTION: I suppose -- are there customarily
3 more than two political party candidates for President
4 on the ballot in Ohio?

5 MR. TAYLOR: There -- I believe the last time
6 we had a third party on the Presidential ballot was in
7 1972. We have had, however, five independent candidates
8 for President on the ballot in both 1976 and 1980.

9 QUESTION: Mr. Taylor, it is still not clear
10 to me what the Petitioner in this case could have done
11 in March and complied with your law. Could he have said
12 that I am a candidate on the Republican convention, and
13 if I don't make that, I want to be an independent?

14 MR. TAYLOR: No, he could not, Justice
15 Marshall. He had to make his election in March as to
16 which of the two routes he wished to take to the
17 ballot.

18 QUESTION: Which would deny him the right to
19 run in the convention. Right?

20 MR. TAYLOR: I don't believe he is denied any
21 right to run in the convention. He is simply asked to
22 make an election.

23 QUESTION: Well, isn't the state of Ohio
24 telling him that he can't run in the convention?

25 MR. TAYLOR: The state of Ohio is not telling

1 him -- There was nothing in this case to prevent
2 Congressman Anderson from having obtained the nomination
3 of the Republican Party at its convention, had he been
4 able to do so.

5 QUESTION: Even after he had -- Even after he
6 had taken these other steps?

7 MR. TAYLOR: That's correct. I mean, the
8 person who is put on the ballot as the candidate of the
9 political party is whoever that political party
10 selects.

11 QUESTION: Can you imagine a political party
12 nominating a man that is an independent candidate in 50
13 states?

14 MR. TAYLOR: I would think it highly
15 unlikely.

16 QUESTION: Highly unlikely. Well, okay.

17 QUESTION: Well, it did happen in California,
18 did it not? On some occasions? Or aren't you familiar
19 with that?

20 MR. TAYLOR: I am not familiar if it did
21 happen in California.

22 QUESTION: I am talking about a convention,
23 not a state.

24 MR. TAYLOR: At the point in time in March
25 then when those two entities have qualified for the

1 ballot, the difference between the independent candidate
2 and the political party is simply that the political
3 party has not yet named the person who is going to carry
4 its banner, and the reason for that goes to the
5 fundamental nature of the differences between political
6 parties and independent candidacies.

7 The independent candidacy is a candidacy by
8 definition built around a single individual who is
9 running on his ideas, his principles, and his beliefs.
10 The political party obviously has a much broader
11 existence. It has principles beyond those of the
12 individual person. It has a continuing program of
13 electing officials that extends beyond a particular
14 election, and it is because of these organizational
15 differences between the political party and the
16 independent candidate that the process for selecting the
17 person who is going to carry the political party banner
18 is more complicated than it is for the independent
19 candidate. By definition, the party must pick and
20 choose its candidate, and it does that through the
21 system of primaries and conventions.

22 This Court considered whether or not the
23 differences, those kinds of differences between
24 political parties and independent candidates might
25 violate the equal protection clause in Jeness against

1 Fortson, in which a claim was in fact made by an
2 independent candidate that there was invidious
3 discrimination because he did in fact have to file his
4 petitions and qualify for the ballot that way, whereas
5 the political party candidate could qualify by winning
6 the primary at some later point in time.

7 The Court in rejecting that claim indicated
8 that these were simply two different types of
9 procedures, and that it is not possible to compare
10 political parties and independent candidates for all
11 purposes, and indeed, that the grossest discrimination
12 can sometimes lie in treating things that are different
13 as though they were the same.

14 And with respect to the Fourteenth Amendment
15 issue in this case, Ohio's position is that it is simply
16 not appropriate to compare those two very different
17 routes to the ballot. However, even accepting the
18 premise offered by Petitioner for the moment, and
19 assuming that one can make an attempt to compare the
20 individuals who seek political party nomination with the
21 independent candidates, we still believe no invidious
22 discrimination can be shown, and that is for this reason.

23 The independent candidates are required to
24 file for the ballot on the same date in March as those
25 party candidates who are seeking delegates to the

1 national conventions. The burden posed on each is the
2 same or arguably even more burdensome for the party
3 candidate, and I should add here that it is indeed clear
4 in Ohio that it is the party candidate who is seeking
5 these delegates. It is the party candidate's name who
6 goes on the ballot. He must give his written consent to
7 all the delegates that file petitions on his behalf, and
8 indeed, he even has the right to determine the order in
9 which delegates are selected.

10 So that it is indeed a case --

11 QUESTION: May I interrupt you for just a
12 second here? It seems to me there is some inconsistency
13 between your two arguments. Your first argument that
14 there is no -- you are comparing different things says
15 that the process in the party process is more
16 complicated, and there are special problems associated,
17 which would seem to justify a longer period to -- for
18 party candidates.

19 But once you said they are different. Now you
20 are saying, well, there is no discrimination because
21 they are the same. But if the reason for the length of
22 time required for the party process doesn't apply to the
23 independents, why do you have it?

24 MR. TAYLOR: Well --

25 QUESTION: Maybe I don't make my question

1 clear.

2 MR. TAYLOR: The arguments -- the argument is
3 an alternative argument, I think, Your Honor.

4 QUESTION: And they are sort of inconsistent
5 with one another.

6 MR. TAYLOR: It is an argument that says we
7 don't think that it's possible to make this comparison,
8 but even assuming --

9 QUESTION: But the reason you say that is, you
10 say you need more time to process the party candidates.
11 That is the heart of your argument, as I understood it.

12 MR. TAYLOR: Yes, sir.

13 QUESTION: And how can then that justify
14 treating them equally?

15 MR. TAYLOR: The burden -- I think it is
16 appropriate to look to the burden that each type of
17 candidate faces in March. The burden in March is, if
18 anything, even at that point in time, forgetting
19 everything that comes after March, if anything, more
20 severe on the party candidate. The party candidate has
21 to file --

22 QUESTION: I think by hypothesis you have
23 settled with her -- Justice O'Connor brought up, we are
24 not interested in the burden on the candidate. We are
25 interested in the burden on -- I don't know how many, 6

1 percent of the electorate was that wanted to vote for
2 Mr. Anderson. We are talking about the burden on those
3 people, as to whether they can vote for the person they
4 want to vote for. And it seems to me your job is to
5 explain to us that that is a reasonable -- it is
6 reasonable to say to that 6 percent of the electorate,
7 no, you cannot vote for Mr. Anderson, for these
8 reasons. You are talking about, you know, the burden on
9 Mr. Anderson, which is not what we are interested in.

10 MR. TAYLOR: Well, there are indeed reasons,
11 and we have advanced, I think, three of them in our
12 brief, for that different treatment between the two
13 candidates.

14 QUESTION: Does Ohio permit a write-in
15 candidate in the election for President or not?

16 MR. TAYLOR: Yes, it does. And as Mr.
17 Frampton indicated, it would require filing, I believe,
18 40 days before the election a notice of intention.

19 QUESTION: On whose part?

20 MR. TAYLOR: On the part of the write-in
21 candidate.

22 QUESTION: Well, may people just walk into the
23 voting place and vote for a person for President who has
24 never indicated any interest in the position? In some
25 states, that can be done.

1 MR. TAYLOR: Well, it can be done in Ohio, Mr.
2 Chief Justice, in a physical sense, in the sense that we
3 have it happen all the time, too, that people do that,
4 but I think the consequence is, if you haven't filed a
5 notice of intention, that the ballots may not be
6 counted.

7 QUESTION: You can vote for them, but they
8 won't be counted.

9 QUESTION: I was just wondering if anybody had
10 ever gotten elected.

11 QUESTION: Has any third party candidate ever
12 been elected, since we have had parties?

13 MR. TAYLOR: No, I don't believe any third
14 party candidate has ever been elected.

15 Returning to the question of whether we are
16 treating the political party candidates and the
17 independent candidates equally, the burden at the point
18 in time in March on the independent candidate is to file
19 5,000 petition signatures. The burden on the political
20 party candidate through his delegates is to file
21 something in excess of 4,000 signatures, slightly less,
22 on behalf of his delegate slate, but on the other hand,
23 those signatures can come only from persons who are
24 members of that political party, unlike with respect to
25 the independent candidate, and there is a geographical

1 distribution requirement with respect to some of those
2 signatures.

3 So that if anything, the burden on the party
4 candidate is more at that point in time. At that point
5 in time, the independent candidate has done everything
6 he needs to do to qualify for the ballot. It is after
7 that point in time that the parties have the more
8 difficult process. So that the -- we are not requiring
9 anything more from the two types of candidates in March
10 of any year.

11 Indeed, the situation is that they are
12 required to do about the same, but after that date it is
13 a much more lengthy and burdensome process for the party
14 to select its candidate. There has --

15 QUESTION: Well, if we focus, Mr. Taylor, on
16 the right of the voter, and then make the inquiry
17 whether it is an undue burden, how do you respond to the
18 argument that it is a severe burden because they simply
19 aren't entitled to vote at all for Mr. Anderson?

20 MR. TAYLOR: Well, in several ways, Justice
21 O'Connor. As a factual matter, we have in fact had many
22 candidates qualify as independent candidates for
23 President on our ballot, so that there is a choice and
24 has been a choice under our system. Indeed, five
25 candidates in each of the last two elections for the

1 independent voters --

2 QUESTION: Yes, but of course those weren't
3 the late blooming people out of a political party, like
4 Mr. Anderson says that his situation represents. So it
5 would be interesting to know if there were other people
6 like Mr. Anderson who came late out of a political party
7 structure who were denied access to the ballot in Ohio.

8 MR. TAYLOR: There is no evidence in the
9 record of this case, and the Petitioner produced none,
10 to show that we have ever had that kind of a problem
11 with the Ohio filing deadline, and we would indeed
12 submit, and the Sixth Circuit, I think, found that the
13 most likely impact of this filing deadline is with
14 respect to a candidate such as Anderson, who had no
15 trouble at all making up his mind that he wanted to seek
16 the Presidency, but simply wished to switch horses in
17 the middle of the stream.

18 As a factual matter, there is simply no
19 evidence of any burden on independent candidates in this
20 case, and I would submit the hypothetical --

21 QUESTION: You only need one case, don't you,
22 and it did keep him off the ballot, didn't it?

23 MR. TAYLOR: That's correct. It did. But of
24 course any time, any time you have a ballot regulation,
25 the plaintiff is going to be somebody who didn't comply

1 with it. If in fact that were the only criteria for
2 determining whether we have enough of a burden so that
3 we have to meet tests like strict scrutiny, we would
4 have it in every case --

5 QUESTION: Yes.

6 MR. TAYLOR: -- because the plaintiff is
7 invariably somebody who hasn't met the requirement,
8 whatever it is.

9 QUESTION: But the difference is that here we
10 can see the burden. We know how many people voted for
11 him. And there were quite a few. We don't have any
12 other case like this? Your five minor party candidates
13 that you say got on the ballot, you had all of them up
14 together, and I bet they didn't get as many votes as he
15 did.

16 MR. TAYLOR: That's correct, Justice Stevens,
17 but I think if we look at the situation that the
18 political party voter finds himself in in August, at the
19 time of his conventions, we find it is not really any
20 different than the voter for the independent candidate.

21 Let's assume, for example, at the time of the
22 convention that a substantial block of persons within a
23 major political party is dissatisfied with all the
24 candidates that have been produced through the primaries
25 and the conventions, and would like -- they don't want

1 to bolt the party, but they would like to coalesce
2 around a different candidate within the party.

3 Well, they are under the same kind of
4 disability that the independent candidate is. The field
5 of candidates is narrowed in the spring.

6 QUESTION: That is not a big disability
7 imposed by your state statute. That is a disability
8 imposed by party problems.

9 MR. TAYLOR: But I think it is fair to view
10 our statute in the context of the way the Presidential
11 election occurs in this country, and indeed, that is
12 critical to an understanding of this alternative equal
13 protection argument, because there has been a
14 fundamental change in the method of selection of the
15 Presidential candidates that occurred just prior to the
16 time that Ohio adopted this filing deadline.

17 The political commentators who have written on
18 this subject in the last two or three years, and we cite
19 six of them on Page 28 of our brief, are unanimous in
20 their declaration that a fundamental change occurred
21 after the 1968 Presidential election such that we
22 switched from basically a brokered convention system to
23 a system that results in the nominees of the parties
24 being selected through the primaries.

25 And those commentators are unanimous in their

1 view that any party candidate who wishes to seek the
2 nomination, if he is serious about it at all, has to go
3 after it in this day and age in the primary, and that
4 means in turn that the candidate has to be seeking
5 delegates to the convention through the primary election
6 system, so that the party candidates in Ohio are going
7 to be in there filing their petitions and making their
8 decision to go for office at the same time as the
9 independent candidate.

10 I think it is a myth to talk about candidates
11 arising as late as August with one possible exception,
12 and that is if you've got an extreme situation like the
13 death of a candidate or a sudden withdrawal, but most of
14 the time, indeed probably more than 90 percent of the
15 time, we are going to have a situation where the people
16 that want this -- the office of President are in there
17 at the same time in Ohio fighting for it.

18 QUESTION: Well, really, all you are arguing
19 is that this doesn't happen very often, but the question
20 is, when it happens, what is the state interest in
21 justifying refusing to let this large group of people
22 vote for the person they want to vote for?

23 MR. TAYLOR: We have -- We are asserting
24 basically three interests in having what we view as a
25 simultaneous filing deadline for party candidates and

1 independent candidates. The first is that we think it
2 promotes the equal treatment of those candidates. The
3 interest that the Sixth Circuit in this case discussed
4 most extensively was the interest in what it called
5 voter education, and the -- having those joint filing
6 deadlines serves that interest in this way. The
7 Presidential campaigns have begun earlier and earlier,
8 if anything, in recent years, and we find the voters
9 buffeted by exploratory committees, and rumors, and it
10 is a confused situation.

11 The requirement that those persons who are
12 serious about pursuing that nomination in Ohio file
13 something at the same time in March that says who they
14 are really serves, I think, a couple of different voter
15 education interests. It enables those people -- It
16 basically puts the voter in the position of
17 understanding what his options are in the spring.

18 I mean, if, for example, he wants to commit a
19 certain amount of money to political campaigns, he knows
20 that his alternative is this group of independents or
21 these people within the political party. If he wants to
22 decide to work for a candidate, he has got all his
23 options in front of him. He knows who is going to be --

24 QUESTION: Mr. Taylor, are you urging that the
25 problem with this case is to adjust constitutional

1 rights to political theorists and theories?

2 MR. TAYLOR: What I am urging --

3 QUESTION: I mean, these six people or
4 whatever it is, I don't even know what you are talking
5 about. I mean, we can't adjust constitutional theories
6 to what they predict that a voter will do, can we?

7 MR. TAYLOR: I think, Your Honor, that it is
8 fair to adjudge the constitutionality of this statute in
9 light of the way the Presidential election system
10 works. I am not talking simply about political theory.
11 I am talking about laws that have been changed --

12 QUESTION: What do you have that is
13 unanimously agreed is how the political theory works? I
14 mean, I for one can mention at least one occasion when
15 all the political theorists in the world were wrong.
16 And I bet you could, too.

17 MR. TAYLOR: Well, without inquiring as to
18 what that situation is, the argument is --

19 QUESTION: I don't know which one I want to
20 give you.

21 (General laughter.)

22 MR. TAYLOR: The argument is simply that as a
23 practical matter, the candidates who are seeking --

24 QUESTION: The Constitution should be measured
25 by a practical matter?

1 MR. TAYLOR: Well, the -- Your Honor, as long
2 ago as Fullman v. Knott, Justice Holmes indicated that
3 an equal protection issue should not be decided upon a
4 hypothetical state of facts, and I think that the
5 situation that is being posed by the Petitioner in this
6 case is largely a hypothetical state of facts. He does
7 not represent one of these late emerging candidacies at
8 the time of the conventions in August. He represents
9 someone who had no trouble at all making up his mind
10 that he wanted to run for President, but simply chose
11 what he later decided to be the wrong method.

12 QUESTION: Do you mean by that that having
13 filed as a Republican, he had decided to change horses,
14 or maybe change from riding a horse to walking.

15 (General laughter.)

16 MR. TAYLOR: What I am saying is that he
17 decided, I think, in this case as early as June, 1979,
18 that he wished the Republican -- or that he wished to
19 become President. Having made that decision, in Ohio he
20 had to decide by March 20th whether he wished to seek it
21 on an independent -- as an independent or through the
22 political party system. He chose the political party
23 system, decided it was a mistake, and tried to switch.

24 QUESTION: Now, when a candidate misses that
25 deadline, an independent candidate, do I understand

1 correctly from what you said that if he gives 40 days'
2 notice, then he may have a write-in campaign, and his --
3 any written in ballots will be counted?

4 MR. TAYLOR: That's correct, Your Honor.

5 QUESTION: So the door is not completely
6 closed to him.

7 MR. TAYLOR: That's correct, Your Honor. The
8 door is not completely closed.

9 QUESTION: How many write-in ballots were cast
10 in the last election in the whole state of Ohio?

11 MR. TAYLOR: I don't know that figure, Justice
12 Marshall.

13 QUESTION: Does anybody? No. You know they
14 weren't even counted, were they?

15 MR. TAYLOR: I am sure that if anyone filed
16 with a 40-day notice, they were counted, but I can't
17 tell you off the top of my head. It is undoubtedly not
18 a large number. I mean, no one is going to contend that
19 it is.

20 I would like to turn quickly in the remaining
21 minute or two to one of the things that was raised by
22 the Petitioner in his statement, and that is the effect
23 of the withdrawal from the ballot, from Ohio's
24 Republican ballot made by Congressman Anderson in this
25 case.

1 He withdrew from the ballot under a Section
2 3513.30 that specifically allows Presidential candidates
3 to withdraw from the ballot up to 30 days before the
4 deadline. We had contended in our answering brief in
5 this case that the purpose of that statute was simply to
6 avoid voter confusion on election day. In the reply
7 brief, Petitioner indicates that, no, that was not the
8 reason for it at all. The reason for it was to avoid
9 what would otherwise be the applicability of Ohio's
10 so-called sore loser statute.

11 The Petitioner is simply incorrect in this
12 contention. If we look at the legislative history for
13 Section 3513.30, which was enacted in House Bill 1245 in
14 1976, a bill that dealt only with this subject, we find
15 that that bill became effective in April, right before
16 the primary date. It was enacted as an emergency
17 measure to get it immediately effective under Ohio law,
18 which requires a higher vote than a normal bill.

19 The reason stated for the bill in that
20 emergency clause was to spare the voters of Ohio the
21 confusion of having on the ballot the names of persons
22 who no longer wished to be candidates, and the expense
23 of counting ballots for such persons. So, indeed, that
24 statute did not have anything to do with avoiding the
25 sore loser provision. The sore loser provision has been

1 stipulated to be inapplicable in this case. It may or
2 may not be inapplicable because of the fact that there
3 was a withdrawal. It is clearly inapplicable because by
4 the terms of the statute itself, it does not apply in
5 the Presidential election, as the Sixth Circuit noted in
6 Footnote 3 of its opinion.

7 Thank you.

8 QUESTION: Mr. Taylor, before you sit down,
9 let me just ask you one question. You started to
10 identify three different state interests that were at
11 stake here. One was the equal treatment of candidates.
12 The second was voter education. You never got to the
13 third. What was the third?

14 MR. TAYLOR: The third is the political
15 stability interest that I have just touched upon.

16 QUESTION: Thank you. I just wanted to be
17 sure I had it.

18 MR. TAYLOR: Thank you.

19 CHIEF JUSTICE BURGER: Do you have anything
20 further, Mr. Frampton? You have four minutes
21 remaining.

22 ORAL ARGUMENT OF GEORGE T. FRAMPTON, JR., ESQ.,

23 ON BEHALF OF THE PETITIONERS - REBUTTAL

24 MR. FRAMPTON: Thank you, Mr. Chief Justice,
25 and may it please the Court, I would just like to

1 respond to one question asked by Justice Stevens, and
2 one by the Chief Justice of Mr. Taylor.

3 I don't think it's just the 6 percent of the
4 electorate that voted for Congressman Anderson in the
5 November election whose rights are burdened here. The
6 record shows and the district court found that as of the
7 time this lawsuit was brought, the poll data, for
8 whatever that is worth, showed that Congressman Anderson
9 was the first choice of some place between 23 and 44
10 percent of the electorate. I think that is a very
11 significant burden.

12 QUESTION: In Ohio?

13 MR. FRAMPTON: Nationwide.

14 QUESTION: What about Ohio?

15 MR. FRAMPTON: We did not have any particular
16 statistics from Ohio, but I believe those polls showed
17 that his strongest support came from eight northeastern
18 states, one of which included Ohio. It didn't break it
19 out beyond that, to my recollection.

20 The burden isn't just a burden that narrows
21 the range of candidates. It would have not only
22 disqualified these people from voting for Congressman
23 Anderson, but from putting forward any independent
24 candidate after March 20.

25 The Chief Justice asked whether any third

1 force candidate had ever been elected President. I
2 believe the answer to that is no. Since 1948, however,
3 three former Presidents, a former Vice President, at
4 least two former Senators, a former Governor, a former
5 Congressman have run for President as third party
6 candidates or independent candidates. They have played
7 an important role in American political history, but it
8 has mainly been a role in the marketplace of ideas and
9 in their impacts on the major parties.

10 They haven't won, and I think that
11 demonstrates that the practical and political barriers
12 to independent candidates are very significant by
13 themselves, and they include the efforts that an
14 independent has to go through to get on the ballot in 50
15 different states under 50 different sets of laws which
16 customarily have exhausted that candidate in ballot
17 access activities rather than campaigning.

18 The proposition of our case is, those burdens
19 are high enough. The state should not be permitted
20 discriminatorily, without a considered state interest,
21 from adding additional handicaps to the independent or
22 the third party candidate without the legislative
23 judgment that that burden --

24 QUESTION: You say that is a considered state
25 interest. Do you mean compelling?

1 MR. FRAMPTON: I use the phrase, Justice
2 Brennan, "a considered legislative judgment," out of the
3 Court's opinion in the Broadrick v. Oklahoma case, which
4 pertained to different kinds of First Amendment rights.

5 QUESTION: But basically, as I understand your
6 argument, if, as you, in your colloquy with Justice
7 White, you fail on the argument that there is an
8 overbreadth about this statute that requires that it be
9 struck down under the First Amendment, that
10 alternatively in any event the state can't justify this
11 statute without establishing a compelling state
12 interest, which it has not done. Am I right?

13 MR. FRAMPTON: You are right, Justice
14 Brennan. In addition to those arguments, we also
15 contend that there is not even a rational relationship,
16 because the voters --

17 QUESTION: I know, but you do -- you do
18 suggest, do you not, that the standard of review ought
19 to be strict scrutiny?

20 MR. FRAMPTON: That is correct.

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

23 (Whereupon, at 11:03 o'clock a.m., the case in
24 the above-entitled matter was submitted.)

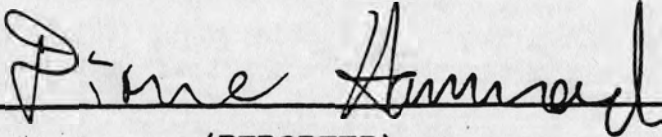
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:
JOHN B. ANDERSON ET AL., Petitioners v. ANTHONY J. CELEBREZZE, JR.
SECRETARY OF THE STATE OF OHIO #81-1635

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "P. H. Anderson", written over a horizontal line.

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHALS OFFICE

1982 DEC 14 AM 9 11