

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 85-656

**TITLE** RALPH MUNRO, SECRETARY OF STATE OF WASHINGTON,  
Appellant V. SOCIALIST WORKERS PARTY, ET AL.

**PLACE** Washington, D. C.

**DATE** October 7, 1986

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   RALPH MUNRO, SECRETARY OF STATE       :

4       OF WASHINGTON,                       :

5                                   Appellant,       :

6                   V.                       :   No. 85-656

7   SOCIALIST WORKERS PARTY, ET AL.       :

8   -----x

9                                   Washington, D.C.

10                                  Tuesday, October 7, 1986

11                   The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States  
13   at 11:02 o'clock a.m.

14   APPEARANCES:

15   JAMES M. JOHNSON, ESQ., Senior Assistant Attorney  
16       General of Washington, Olympia, Washington; on  
17       behalf of the appellant.

18   DANIEL HOYT SMITH, ESQ., Seattle, Washington; on  
19       behalf of the appellees.

**C O N T E N T S**

**ORAL ARGUMENT OF**

**PAGE**

**JAMES M. JOHNSON, ESQ.,**

**on behalf of the appellant**

**3**

**DANIEL HOYT SMITH, ESQ.,**

**on behalf of the appellees**

**25**

**JAMES M. JOHNSON, ESQ.,**

**on behalf of the appellant - rebuttal**

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No. 85-656, Ralph Munro, Secretary of State of Washington, versus Socialist Workers Party.

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

ORAL ARGUMENT OF JAMES M. JOHNSON, ESQ.,  
ON BEHALF OF THE APPELLANT

MR. JOHNSON: Mr. Chief Justice, and may it please the Court, the State of Washington has a uniquely open election system, a system unusually hospitable to new and minor parties and independents and their candidates. Washington voters wishing to exercise their right to politically associate through these vehicles easily organize and choose their candidates. Those candidates have long been automatically placed on the Washington elections ballot.

After a 1976 election, with the most crowded ballot in Washington's history, the Washington legislature decided to exercise what this Court has called a state's undoubted right to require candidates to make a showing of substantial support in order to qualify for a place on the ballot.

The Washington legislature, by statute, placed all candidates on the primary ballot and added a



1 requirement that any candidate not able to attract the  
2 votes of 1 percent of the voters would not remain on the  
3 ballot a second time. It is that 1 percent requirement  
4 to remain on the ballot a second time that is challenged  
5 here by a candidate placed on the Washington primary  
6 ballot who got fewer than 600 votes, less than one-tenth  
7 of the 1 percent, and thus was not remained on the --  
8 did not remain on the Washington ballot a second time in  
9 the general election.

10 I shall explain first the Washington  
11 experience and the election with its crowded ballot in  
12 1976 leading to this change, then telling you why the 1  
13 percent is consistent with this Court's numerical  
14 definitions of substantial support and argue under this  
15 Court's decision the Washington requirement is neither  
16 unconstitutional per se and is less than the numerical  
17 test that this Court has approved, such as the Jenness  
18 v. Fortson, a 5 percent of voters test, arguing that it  
19 is less burdensome on minor parties and serves to  
20 improve the political debate which is the constitutional  
21 issue before the Court; finally -- and also that the  
22 Washington statute by cutting off some few candidates  
23 avoids subsidizing hopeless candidates, as this Court  
24 recognized in the different case of Buckley v. Valeo was  
25 appropriate. Finally, I can show --

1                   QUESTION: Subsidizing meaning printing,  
2 including their name on the ballot?

3                   MR. JOHNSON: There's more than that in the  
4 State of Washington, Chief Justice Rehnquist. The  
5 printing on the ballot and the counting of votes is one  
6 issue. Washington is also unique in the states that we  
7 print and distribute to every residence in Washington a  
8 voter's pamphlet and candidates' pamphlet for  
9 publicizing the election and the candidates, at  
10 considerable expense. In that additional regard, I  
11 think, we are subsidizing hopeless candidates by placing  
12 on the ballot those candidates that have not and will  
13 not receive any substantial support.

14                  QUESTION: Is that kind of information  
15 disseminated in connection with the primary as well as  
16 the general election?

17                  MR. JOHNSON: It is not, Justice Stevens. It  
18 is only disseminated in conjunction with the general,  
19 and may have been one factor in the legislature  
20 determination to move this substantial support  
21 determination to the primary. I referred to  
22 Washington's uniquely open system. I shortly explain,  
23 and explain the relevance of this system.

24                  In Washington there is no party registration.  
25 There is no identification of voters by party in the

1 State of Washington at all. The voting is a blanket  
2 primary, we have referred to it, and the general is the  
3 same. Under a blanket voting system each Washington  
4 voter may vote for any candidate for any position  
5 irregardless of party affiliation. One vote per race,  
6 of course.

7 In a case tomorrow arising from Connecticut  
8 you will hear debated the merits of open versus closed  
9 primaries and restrictions on voters, how they vote by  
10 party. In Washington we have no such system. The  
11 Washington system is more open than the open primary.  
12 This has direct relevance, of course, to using a primary  
13 vote requirement for determining substantial support,  
14 since any Washington voter attracted to the votes can  
15 vote for any and all candidates.

16 For example, a Washington voter may choose to  
17 vote for a Socialist Worker candidate for governor, a  
18 Republican candidate for U.S. Senate, a Democrat  
19 candidate for their local legislatures, et cetera, down  
20 the ballot. Thus again the primary test is much easier  
21 than it would be in most states with either a closed or  
22 open primary in which party affiliation is somehow  
23 tested first before the voters can exercise their  
24 option.

25 Finally, in Washington if any candidate is not

1 on the ballot a Washington voter can write in any  
2 candidate with the sole exception of a sore loser of a  
3 major party primary. The Court of Appeals decision in  
4 this regard is just confused. The District Court  
5 finding of fact and conclusion of law at JSC5 is  
6 accurate. The Washington statute allows write-ins with  
7 the sole exception I have mentioned. If not on the  
8 ballot, of course, in the Washington system the voters  
9 have made that decision.

10 In 1976 the voters had lots of options to  
11 choose from, culminating the preceding four elections'  
12 increase in the number of independent and minor  
13 candidates. The 1976 election had 12 parties, one of  
14 which, the OWL, Out with Logic, On with Lunacy, Party,  
15 was avowedly frivolous and ran a statewide slate. There  
16 were numerous candidates, however, as noted in our  
17 brief, 65 of them on that ballot. Important to note,  
18 though, is that of these --

19 QUESTION: Sixty-five candidates for what, Mr.  
20 Johnson?

21 MR. JOHNSON: Sixty-five candidates for  
22 statewide and Congressional races, Your Honor, Mr. Chief  
23 Justice.

24 QUESTION: So those were not just local  
25 races.



1 MR. JOHNSON: That does not include local  
2 races, no. That is summarized in the appendix. It is a  
3 confusing number, confusing in this particular regard.  
4 It includes all the Congressional candidates, and every  
5 Washington voter did not have access to those, so each  
6 voter would have faced probably 12 fewer, and then added  
7 to the -- at the end of the ballot would have been the  
8 local races together with such issues as constitutional  
9 and levy elections. It was a long --

10 QUESTION: How many candidates were there for  
11 Governor?

12 MR. JOHNSON: There were eight candidates for  
13 Governor, Your Honor, Mr. Chief Justice, and a good  
14 example of showing that the candidates, the non -- the  
15 minor party independents did not attract any substantial  
16 support. Of those six independent and minor party  
17 candidates, none of them got 1 percent in the general  
18 election. Four of them, including the Socialist Workers  
19 Party candidate, got less than .3 percent of the  
20 ballot. This, by the way, was also consistent with the  
21 preceding history in Washington of minor parties and  
22 independents.

23 As noted in our reply brief, since the  
24 Depression, only two such candidates for statewide  
25 office had ever received even 1 percent of the vote.  
The Washington legislature reasonably then saw this

1 unduly lengthy ballot, and as we have discussed, Mr.  
2 Chief Justice, with regards to the voters' pamphlet, I  
3 think reasonably concluded that in some regard the  
4 ballot placement and the voters' pamphlet were  
5 subsidizing hopeless candidates, and the "subsidizing  
6 hopeless candidates" is your language --

7 QUESTION: Well, of course, that could be  
8 remedied by not printing them.

9 MR. JOHNSON: Yes, but much to the detriment  
10 of the voting system, at least in the judgment of the  
11 legislature and the citizens of Washington, Justice  
12 Marshall. The voters' pamphlet serves to publicize all  
13 the election as well as helping --

14 QUESTION: I don't think it is something to  
15 keep emphasizing. You mention it every other minute.

16 MR. JOHNSON: Justice Marshall, as in Buckley  
17 v. Valeo, I think the public is not obligated to  
18 undertake public financing of elections. That quote was  
19 extracted because I think the concepts are similar in  
20 that one regard. The encumbering of the ballot,  
21 however, remains irregardless of whether a voters'  
22 pamphlet is chosen.

23 QUESTION: Mr. Johnson, I feel bound to inform  
24 you that there is no word in the English language  
25 "irregardless." The word is "regardless."

1 MR. JOHNSON: Thank you, Chief Justice. Thank  
2 you.

3 And regardless, the problem of an encumbered  
4 ballot as existed in 1976 remains. The Washington  
5 legislative solution to that problem and to this Court's  
6 then recent decisions in Jenness and American Party of  
7 Texas, recognizing that the state had the authority to  
8 remove frivolous candidates or remove those that had no  
9 public support, the legislature reacted in these ways.  
10 All candidates were placed on the primary with an  
11 essentially concurrent filing for minor party and  
12 independents and the major parties. That is, the  
13 convention for minors and independents is a Saturday,  
14 Monday the filing begins, and on the Friday of the same  
15 week the convention certificate together with the major  
16 party are closed.

17 One percent requirement was imposed. Any  
18 candidate not getting 1 percent would not remain on the  
19 ballot. Important to note, this was down from the  
20 preceding 5 percent requirement. The preceding 5  
21 percent, of course, applied only to major parties who in  
22 the earlier system were the only ones on the primary  
23 ballot.

24 QUESTION: And of course it is 5 percent of  
25 something different, isn't it?

1 MR. JOHNSON: No, the 5 percent before,  
2 Justice Stevens, was also applied to the primary vote.

3 QUESTION: I thought it was -- oh, I see.

4 MR. JOHNSON: This was in the Washington  
5 system before the legislative change.

6 QUESTION: The 5 percent was required for the  
7 major party candidate to get on the ballot?

8 MR. JOHNSON: It was. A major party candidate  
9 not getting even 5 percent would not remain on --

10 QUESTION: Of course, that would never happen,  
11 I don't suppose.

12 MR. JOHNSON: The record here does not show  
13 that.

14 QUESTION: Does the record contain examples of  
15 this pamphlet you describe as being sent out to the  
16 voters?

17 MR. JOHNSON: I don't believe there is such in  
18 the record, Your Honor.

19 QUESTION: Is there any reference to it at all  
20 in the record?

21 MR. JOHNSON: There is reference in the  
22 legislative history.

23 QUESTION: No, I mean in the record before  
24 us.

25 MR. JOHNSON: I think there is not.



1 QUESTION: So you have just told us about it  
2 for the first time?

3 MR. JOHNSON: Pardon? It is, however --

4 QUESTION: Yet this was one of the major  
5 things they were saving in enacting this statute?

6 MR. JOHNSON: I think it is in the legislative  
7 history, A, Justice Stevens, and it is a statutory  
8 requirement of which I think the Court can take judicial  
9 knowledge. In Washington Code 2981 140, which as I  
10 noted requires its preparation and distribution to all  
11 residences.

12 QUESTION: Could you tell me why it is that in  
13 running in this primary the independent and small party  
14 candidates are not really running in the primary? The  
15 system is set up so that they have to be nominated by  
16 some sort of a convention system previously. And that  
17 is one of the complaints here, that it is a primary  
18 that -- for them it's a primary that really isn't a  
19 primary.

20 MR. JOHNSON: Justice Scalia, I do not  
21 understand -- first, the nominating convention  
22 requirement was not challenged below, nor do I  
23 understand the party here to object or to prefer primary  
24 nomination for its candidates. In this regard, the  
25 minor parties have an advantage over major parties, and

1 it makes some sense for minor or new parties. They can  
2 control their own candidate rather than going through  
3 the blanket primary system to allow all Washington  
4 voters to choose their candidates.

5 QUESTION: I see.

6 MR. JOHNSON: I think, but Mr. Smith may best  
7 address whether this is preferred by the party.

8 QUESTION: I am still curious as to the reason  
9 for it. Is that -- was that the reason, to prevent  
10 party cross-overs from destroying small and independent  
11 parties?

12 MR. JOHNSON: The legislative record does not  
13 show that.

14 QUESTION: You don't have any guess as to what  
15 it was --

16 MR. JOHNSON: Printed as A1 in our reply  
17 brief, in that appendix the legislative memorandum  
18 mentions the question of minor parties being allowed to  
19 not control their own candidates and convention, which  
20 suggests to me the argument I have just advanced, that  
21 what was intended was to let them at the smaller stage  
22 not have the general election -- the major parties in  
23 Washington sometimes object to the primary system we  
24 have, which allows all voters to determine a party's  
25 nominees. And I think the analysis is more likely to be

1 applied in a small and growing party that would like to  
2 control its own candidates.

3 QUESTION: But you understand that one of the  
4 arguments being made here is that since there are not  
5 two candidates competing, why would you expect voters to  
6 come out to vote for their --

7 MR. JOHNSON: I do understand that, and I  
8 think, Justice Scalia, the answer in part is the  
9 Washington system. The primary serves -- on the primary  
10 ballot in Washington are not just candidate nominations  
11 but local races, nonpartisan races, together with local  
12 issues such as levies and those kinds of things.

13 The burden imposed on a minor party candidate  
14 is exactly the same as any candidate. They have to  
15 bring out voters and get them to vote for them. In the  
16 Washington system the beauty for a minor party is that  
17 every voter that comes to the polls can vote for the  
18 minor party candidate, as I mentioned. In a blanket  
19 primary they don't have to just attract -- any voter  
20 that walks into that poll can vote for one of the  
21 candidates. Typically, by the way, the minor party  
22 doesn't run a whole slate of candidates.

23 In this regard it also has two advantages over  
24 the prior system. First, the old system had the  
25 convention the same day as the primary, and so you

1 had -- a minor party adherent had to give up their  
2 primary right to go to the convention. In this regard  
3 it is a direct benefit. Secondly --

4 QUESTION: What did they give up? I don't  
5 understand.

6 MR. JOHNSON: In the old system, Justice  
7 Stevens, you had to go to the convention the same day as  
8 the primary and could not vote in the primary.

9 QUESTION: You mean the person who was a  
10 delegate to the convention couldn't vote?

11 MR. JOHNSON: Yes.

12 QUESTION: Why couldn't he? If the convention  
13 was held in his home town, couldn't he do both?

14 MR. JOHNSON: The statute prohibited it.

15 QUESTION: Oh, I see. But why would he want  
16 to vote in a primary if -- I don't understand --

17 MR. JOHNSON: There are lots of other issues  
18 on the primary, Justice Stevens, than this nomination.

19 QUESTION: Oh, I see.

20 MR. JOHNSON: Typically a small party, and  
21 this case has several examples, only nominates for a  
22 couple of races. Under the old system --

23 QUESTION: But you have other issues like bond  
24 issues and things like that on your primary ballot?

25 MR. JOHNSON: And you can go to the primary



1 and vote for the Socialist Workers' candidate for  
2 Governor or legislator and also vote for the other  
3 party --

4       QUESTION: It occurs to me that the 1 percent  
5 requirement could be quite different in an election  
6 which had, say there was no contest for the Democratic  
7 nomination and no contest for the Republican  
8 nomination. It might be rather easy to get a 1 percent  
9 then, but if you have a big party fight going on and a  
10 lot of other issues, the 1 percent would then be ten or  
11 fifteen times as hard to get.

12       MR. JOHNSON: Justice Stevens, it depends on  
13 the position. In our most recent race --

14       QUESTION: It depends on what the issues are  
15 at the primary election.

16       MR. JOHNSON: And the position. In our most  
17 recent primary, the hotly contested race for U.S.  
18 Senator, but if the Socialist Workers had a candidate  
19 for a legislative race any place down the ballot, all  
20 the voters that are attracted to that hot race, as you  
21 called it, could vote for that position also.

22       It has -- the system has another advantage  
23 over either the petition or the prior system in that it  
24 added the minor parties and independents into the  
25 political debate. That is what we are talking about

1 here, is broadening the political debate, and under the  
2 prior system or any other system the minor parties and  
3 independents have no role in the period of debate in  
4 Washington leading up to the primary because they are  
5 not on the ballot.

6 In that regard the primary is actually  
7 monopolized by the major parties if they are the only  
8 ones on the ballot. By adding them into the ballot  
9 there is at least this advantage, if not to the party,  
10 and I think it is to the party, there is the advantage  
11 to the voters in the political debate that they are  
12 allowed in.

13 The primary system that it is not per se  
14 unconstitutional, we can say at least from this Court's  
15 summary affirmance in *Allen v. Austin* in 1977 of such a  
16 system. Indeed, since that was summary affirmance, I  
17 suppose that is the most I can say, that it is not  
18 unconstitutional per se. That it is numerically  
19 consistent with the then recent cases of *Jenness v.*  
20 *Fortson* and *American Party of Texas* we have pointed out  
21 in the table in the brief, the example being the *Jenness*  
22 system, in which this Court approved a petition  
23 requirement of 5 percent of the registered voters in  
24 Georgia. Such a requirement imposed in the State of  
25 Washington would mean 122,000 signatures to get the

1 statewide gubernatorial candidate of a minor party on  
2 the ballot in Washington, as contrasted with the 9,100  
3 required as 1 percent of the primary vote in 1984.

4 Now, it may be more difficult to get one voter  
5 out to vote in a primary, but I submit it is not 13  
6 times more difficult to get a voter than it is to get a  
7 petition. I further argue that the political debate  
8 benefits by the choice. In this regard the primary  
9 system is better than a petition.

10 After all, the petition, once filled in, the  
11 petitions are discarded. The buttonholing of  
12 candidates, which one of the amicus -- excuse me, the  
13 buttonholing of voters, which one of the amicus briefs  
14 suggest is a real easy way to get petitions that is  
15 probably true, but it adds little to the political  
16 debate, as contrasted with the Washington system, as I  
17 have noted, which encourages the same time and money and  
18 effort to be expended instead in attracting voters to  
19 the primary and getting them there to vote for their  
20 candidates.

21 The limited resources of a minor party, I  
22 suggest, are better expended in getting voters out and  
23 getting them to the primary than they are through this,  
24 to us, to Washington, basically meaningless  
25 petition-gathering proposition, meaningless in the sense

1 it doesn't really add to the political debate, which is  
2 the issue, the interest that we are trying to protect.  
3 I also --

4 QUESTION: Why, then, do you suppose the minor  
5 parties have had such bad luck under this new law?

6 MR. JOHNSON: There are three reasons, and by  
7 the way --

8 QUESTION: That is true, isn't it? Weren't  
9 they more frequently on the ballot before this law was  
10 changed?

11 MR. JOHNSON: Justice White, I think the Ninth  
12 Circuit says that, and I think they are applying the  
13 wrong historical analysis. They improperly limited  
14 their consideration to only statewide offices and only  
15 minor parties, implicitly assuming that the right  
16 involved is a right of candidacy.

17 QUESTION: To the extent their analysis --  
18 they should have looked more broadly, but their narrow  
19 look was correct?

20 MR. JOHNSON: The statistics were correct,  
21 with the exception that they were numerically wrong  
22 about independents. Independents statewide have  
23 actually placed four out of five candidates on the  
24 general election.

25 QUESTION: You mean since the law was



1 changed?

2 MR. JOHNSON: Since the law was changed. What  
3 we are looking for, though, is not -- we are not trying  
4 to accommodate rights of candidates, because most  
5 recently in *Clements v. Fashion*, this Court said there  
6 is no right of candidacy, and surely not a right to have  
7 your name placed on the general election ballot.

8 QUESTION: I wasn't suggesting that the  
9 experience of the -- that the state had to allow the  
10 same access to the general ballot as they had had before  
11 this new law.

12 MR. JOHNSON: Then it is a slight reduction.

13 QUESTION: The question is whether this new  
14 law is constitutional.

15 MR. JOHNSON: Yes, Justice Stevens, but I  
16 think what we are looking for in the historical material  
17 is -- we are analyzing for the rights of the voters so  
18 we are --

19 QUESTION: I feel obligated to tell you that  
20 my name is White.

21 MR. JOHNSON: I am sorry.

22 (General laughter.)

23 MR. JOHNSON: Thank you again for the  
24 correction.

25 Justice White, what we are seeking here,

1       though, is an index to the health of the political  
2       system, aren't we? We look at the historical  
3       information to see whether Washington's system allows  
4       major parties to monopolize the debate, or do we have a  
5       healthy system which allows and even encourages  
6       dissent. Put another way, again, do the major parties  
7       monopolize debate in Washington? The answer is clear  
8       from the record. The wide-ranging debate is alive and  
9       well in Washington. In 1984 the --

10                QUESTION: Maybe the Socialist Workers Party  
11       position would be that the issues that are alive and  
12       well and being debated in Washington aren't the ones we  
13       want to debate. We have got some other things that may  
14       seem odd to a lot of people, but we still would like to  
15       mount our little campaign.

16                MR. JOHNSON: And we think that is very  
17       important. Washington thinks that is very important,  
18       Chief Justice Rehnquist, and protects it, first through  
19       allowing the party nearly automatic access to the  
20       primary, and secondly, the figures will show that even  
21       this party has consistently placed candidates. It is  
22       true that they have not been successful in attracting  
23       votes in the statewide races.

24                In the '84 election their Governor candidate  
25       did not qualify, but their candidate for U.S.

1 Representative did qualify.

2 QUESTION: Where did they get their votes from  
3 in King County and Takoma?

4 MR. JOHNSON: I think they have conceded in  
5 their brief this party has its major -- if there is a  
6 base of adherence, is in Seattle-Takoma metropolitan  
7 area. I am sorry about the name error. To answer you  
8 first question, why they don't qualify, I think there  
9 are three reasons. The Court has said we are entitled,  
10 the state is, to ask for reasonably diligent  
11 candidates. Two, they may have a message the voters  
12 just do not like.

13 Or, three, they may have unattractive  
14 candidates, and on this record we don't know exactly why  
15 Mr. Peoples didn't qualify, but the record does show  
16 they expended \$1,900 on a statewide Senate race in the  
17 State of Washington, an insignificant amount, and if it  
18 reflects the support that they could draw, a financial  
19 support, the effort, I say, was insignificant.

20 As you have noted, their support is concededly  
21 in the Seattle-Takoma area, where all that effort was  
22 expended, instead of broadening their base to the whole  
23 of the state.

24 Finally, the record also shows the affidavit  
25 at C13 was their affidavit setting forth all the

1 electoral efforts. Four out of five news releases they  
2 put out, four out of five were about this case.

3 QUESTION: Mr. Johnson, what is the state  
4 interest you rely on? .

5 MR. JOHNSON: Primarily what this state, this  
6 Court has conceded the state's interest in requiring a  
7 showing of substantial support before a candidate  
8 appears on the ballot. However, Justice O'Connor, we  
9 allow the candidate on the ballot the first time, the  
10 primary, without such a requirement. In that regard I  
11 believe the Washington system treats them better, them  
12 being minor parties, better than most systems.

13 QUESTION: So you rely only on a purpose of  
14 the state of requiring substantial support.

15 MR. JOHNSON: And that purpose serves two --

16 QUESTION: And what underlies that?

17 MR. JOHNSON: That purpose serves two  
18 interests. First, avoiding the unduly lengthy laundry  
19 list ballot that this Court has referred to with the  
20 possible effect of confusing voters and allowing  
21 frivolous candidates --

22 QUESTION: Well, under your system the ballot  
23 is so long and complicated already that that might not  
24 be a very persuasive argument. What else --

25 MR. JOHNSON: It was a persuasive argument to



1 the Washington legislature, Justice O'Connor, and I  
2 think they have a right under this Court's decision to  
3 respond to that. Secondly, as I have discussed with  
4 Justice Marshall, in some regard placing candidates that  
5 history shows have never attracted substantial support,  
6 works to be subsidizing hopeless candidates, nor is the  
7 state or the government obligated to subsidize these  
8 hopeless candidates. We can require them to exercise  
9 some reasonable diligence and expend some effort.

10           Ultimately, then, to the extent that a few of  
11 these candidates do not remain on the ballot, and as we  
12 note in our reply brief, the summary numbers are that of  
13 48 candidates, independent and minor party, since the  
14 '76 election, since the '76 changes, I believe the  
15 number was 37 of them have remained on the general  
16 election ballot, and again, they are already on the  
17 ballot in the primary and thus afforded the opportunity  
18 to participate in political debate through that part,  
19 and most of them, albeit usually for the U.S.  
20 Representative and local races, including Washington  
21 State legislative, most of those candidates have  
22 remained on the ballot.

23           The voters determine who stays on the ballot,  
24 and that is an important part of the democratic system.  
25 The constitutional objective or test was differently

1     stated by the majority and the dissent in this Court in  
2     your 1983 Anderson v. Celebrezze case, the majority  
3     saying the primary values protected by the First  
4     Amendment here are a commitment to debate on public  
5     issues, uninhibited, robust, and wide open, not  
6     monopolized by the existing political parties.

7             The dissent differently stated that a court's  
8     job is to ensure that the state in no way freezes the  
9     status quo but implicitly recognizes the potential  
10    fluidity of American political life. Under either  
11    formulation of the constitutional issues here, the  
12    Washington statute and Washington election system meets  
13    the test and protects the constitutional rights of its  
14    voters.

15            The decision below should be reversed.

16            CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
17    Johnson.

18            Mr. Smith, we will hear from you now.

19            ORAL ARGUMENT OF DANIEL HOYT SMITH, ESQ.,

20                   ON BEHALF OF THE APPELLEES

21            MR. SMITH: Mr. Chief Justice, and may it  
22    please the Court, when we analyzed state restrictions on  
23    political expression and association relating to minor  
24    parties with dissident views, we are operating in the  
25    core of the First Amendment. Since there is no litmus

1 test for ballot access restrictions, the numbers game is  
2 not useful. The cases do not say 1 percent is  
3 constitutional or an early deadline is unconstitutional,  
4 so to decide this case it is necessary to look at three  
5 questions.

6 First, did the 1977 additional restrictions  
7 have a substantial impact on expression and association  
8 of minor parties and voters? Two, is there a  
9 governmental interest in these additional restrictions  
10 so compelling that it outweighs the burden on  
11 fundamental First Amendment rights? And three, are the  
12 new restrictions precisely drawn so that First Amendment  
13 rights are not necessarily -- unnecessarily burdened, or  
14 could the legitimate state interest be achieved by less  
15 drastic means?

16 I would like to address these in order, but  
17 first I must touch on the most crucial aspect of  
18 Washington's ballot access amendments of 1977. This was  
19 the conversion of the traditional one-step barrier as it  
20 applies in every other state in which qualifying  
21 candidates participate in the general election whether  
22 they are a minor party or major party nominees to a  
23 two-step exclusionary process.

24 Now, as to the first step, as Mr. Johnson has  
25 discussed, Washington's nomination process, by

1 convention, is different from a door-to-door petition  
2 signature requirement, so it is not automatic  
3 qualification. Far from it. The mounting of a  
4 convention does require substantial effort, and in 1977  
5 the legislature doubled the number of participants  
6 required with the result that the nominees that have  
7 been able to -- the minor parties that have been able to  
8 qualify as shown by the table on Page 5 and 6 of our  
9 brief has been extremely limited --

10 QUESTION: You are referring now, Mr. Smith,  
11 to the statutory requirements for the convention?

12 MR. SMITH: Correct.

13 QUESTION: What are those?

14 MR. SMITH: The convention requires that on  
15 the Saturday before the major parties even have to  
16 declare their candidacy, the minor party has to gather  
17 supporters on one day in one place, nominate its  
18 candidates, and have a nominating petition signed by a  
19 number, which is now on a sliding scale, according to  
20 population, approximately 200 at this time, registered  
21 voters who give their names and voting addresses  
22 attesting to the nomination of that candidate.

23 QUESTION: That means that 200 registered  
24 voters would have to attend the convention?

25 MR. SMITH: That's correct. And that



1 restriction had been somewhat, I guess, degenerating by  
2 the increase of population, and the legislature remedied  
3 that problem. Previously it had been 25. It had been  
4 raised to 100. In 1977 the legislature about doubled  
5 it, and now it is tied to population. Since that  
6 change, the number of nominees has been one, two, or in  
7 one case three, and so we are talking about a very small  
8 and identifiable group of dissident parties who like the  
9 Socialist Workers Party and the Libertarian Party who  
10 filed the amicus brief here, who consistently over the  
11 years have put forth substantial effort into the  
12 electoral system to introduce their new ideas to the  
13 voters and have continued to be able to qualify  
14 candidates in very small numbers by convention.

15 QUESTION: You are saying what it now takes is  
16 200 people in a convention.

17 MR. SMITH: In a convention.

18 QUESTION: That is for a party.

19 MR. SMITH: That's correct.

20 QUESTION: What if you want to run without  
21 party support?

22 MR. SMITH: As an independent it is the same  
23 requirement for a similar convention. You have to  
24 organize a convention to support your independent  
25 candidacy and get the signatures of the same number of

1 voters.

2 QUESTION: Well, now, if this were the only  
3 requirement to get on the general election ballot you  
4 wouldn't be challenging it, would you?

5 MR. SMITH: That's correct, and we believe  
6 that the record shows that historically a reasonable but  
7 small number of serious minor parties have been able to  
8 qualify, and since this has been adopted have still been  
9 able to nominate candidates.

10 Our objection is that these nominees who have  
11 qualified are then universally eliminated by the primary  
12 requirement, and as Mr. Johnson -- or as Mr. Justice  
13 Stevens brought out, it is a different situation for the  
14 minor parties than for the major parties, and it depends  
15 not primarily on the level of support, which is  
16 admittedly small because by definition these minor  
17 parties are small parties, and their contribution to our  
18 electoral politics does not depend on mass support, but  
19 the single example of any minor party candidate that has  
20 been able to meet the requirement since 1977 has been  
21 one race where there was only a single Democrat and a  
22 single Republican on the primary ballot, and so there  
23 was no contest, and it resembled a party versus party  
24 choice, and in that situation the Libertarian Party  
25 candidate for treasurer, a relatively low profile race,

1 but was able to get the 1 percent.

2 With that exception, when there was no  
3 contest, every time there has been a contest for the  
4 Republican or Democratic nomination, no minor party  
5 candidate has ever been able to qualify for statewide  
6 office. It has been a blanket exclusion, as the Ninth  
7 Circuit correctly found the record indicates.

8 So that is the first question that the Court  
9 needs to address: Has there been a substantial impact  
10 on the participation of minor parties and the interest  
11 that that affects of both the minor parties and the  
12 voters in injecting their ideas into the electoral  
13 system.

14 QUESTION: Mr. Smith, is that relevant? I  
15 mean, all that it would prove -- It would prove either,  
16 either that the new law is excessively restrictive or  
17 that the old law was excessively latitudinarian. It  
18 could prove either one. It depends entirely on whether  
19 there were too many parties before, whether the parties  
20 beforehand did not have a significant amount of popular  
21 support, significant enough under our laws to justify  
22 putting them on the ballot.

23 Now, how do we know that the preexisting  
24 situation was a good situation? I tend to think that  
25 the OWL Party is not something that we needed on the

1 ballot in Washington.

2 MR. SMITH: Well, with regard to the first  
3 question you ask, Justice Scalia, whether it is too  
4 latitudinarian, this Court has said that one of the  
5 first things we can look at is whether in practice as  
6 applied minor parties are able to qualify, and the Court  
7 has said it is one thing if minor parties are regularly  
8 able to qualify for the ballot, and it is quite another  
9 thing if only rarely can any minor party get on.

10 And this case definitely presents the  
11 situation of that other thing where minor parties are  
12 systematically barred. With regard to the OWL Party,  
13 the record indicates that the legislature was reacting  
14 to a situation where they were offended by the  
15 insufficient reverence that the OWL Party paid to the  
16 major parties, and particularly and ironically to the  
17 level of public support that the OWL Party was able to  
18 get, and --

19 QUESTION: Mr. Smith, would you accept any  
20 number? Suppose the state said you have to have at  
21 least 100 votes.

22 MR. SMITH: Yes, we believe that the fact that  
23 serious minor parties have been regularly able to meet  
24 the nominating convention requirement would be adequate  
25 support for that requirement to withstand any attack by



1 somebody else who was not able to meet it to say the  
2 fact that these small but serious minor parties are able  
3 to meet this requirement indicates it is fair.

4 QUESTION: So if somebody has a convention of  
5 200 relatives they can get on the ballot?

6 MR. SMITH: The historical record indicates  
7 that that is not a problem, that that has never happened  
8 in the State of Washington, and that there is no support  
9 on the record for the fear that that might happen,  
10 especially not if the remedy for such a hypothetical  
11 fear should be such a real and drastic and devastating  
12 impact on the few minor parties who need this route to  
13 the ballot.

14 QUESTION: Well, do you think a person could  
15 during 20 years of his life run every two years and get  
16 less than ten votes?

17 MR. SMITH: Pardon me?

18 QUESTION: You don't understand the question?  
19 John Dokes runs for Congressman ten elections in a row  
20 and never got more than ten votes. The state has to  
21 consider him as a serious candidate.

22 MR. SMITH: Well, I believe if the state wants  
23 to let people on without mounting the substantial effort  
24 that the convention requires, that the state may make  
25 that choice to open its ballot to those kinds of

1 candidates, but --

2 QUESTION: Is it obliged to?

3 MR. SMITH: We are not suggesting that it is  
4 obliged to. We are suggesting that when it has got this  
5 first stage requirement which already limits the ballot  
6 to a small number of serious parties, to add the second  
7 stage, which totally wipes them off the ballot, is not  
8 -- first of all, has a drastic impact, and second, is  
9 not necessary.

10 QUESTION: Well, Mr. Smith, in your definition  
11 of serious minor party when you were replying to Justice  
12 Marshall's question, I gather there is a numerical  
13 component to seriousness. The party which can muster  
14 only ten votes at its convention, it may have ten of the  
15 best debaters and the best philosophers in the State of  
16 Washington but the state can say that just isn't  
17 enough. Is that correct?

18 MR. SMITH: Well, the hypothetical question is  
19 not posed in this case because we have a real situation  
20 in which there is a real and substantial requirement to  
21 qualify. If we didn't have this historical experience  
22 and we had to hypothesize in the dark, the state could  
23 test out a requirement and see if serious parties could  
24 qualify.

25 QUESTION: But it seems to me part of your

1 argument is that our cases have said that there must be  
2 a way for serious minor parties to get on the ballot.

3 MR. SMITH: That's correct.

4 QUESTION: And I am curious to know whether  
5 the way you use that term the term "serious" can at  
6 least be construed by the state to have a numerical  
7 component. That is, serious minor parties who can  
8 muster one-half percent of the turnout at the last  
9 election for that office at some stage in the campaign,  
10 just take hypothetically.

11 MR. SMITH: Well, it depends on what the  
12 requirement is, because the numerical requirements for  
13 petition signatures, which are the only requirements  
14 that have been upheld by this Court, do represent some  
15 level of organizational ability and diligence that the  
16 party itself can control and go out and get signatures  
17 on the petitions, in Jenness, for example.

18 We are not saying we will vote for this  
19 candidate, but we think that this candidate should be  
20 allowed on the ballot, and because of the traditional  
21 American openness to hearing different points of view,  
22 it is very easy to get people to go out and say, yes, we  
23 believe you should be allowed to be heard, and in  
24 American Party versus Texas, the Socialist Workers Party  
25 went out and got 22,000 plus signatures on their

1 petition to get on the ballot without a serious problem  
2 but by their diligence and by their effort.

3 And the vote, on the other hand, as the record  
4 indicates, reflects the primary contest by the major  
5 parties and not the diligence or the efforts put out by  
6 the minor party within their limited capabilities, but  
7 that is more related to the contribution a party can  
8 make to the debate that they are capable of organizing  
9 and organizational effort like that to gather petition  
10 signatures than to make it rely on having some certain  
11 level of support in the primary election for a number of  
12 reasons.

13 Number One is that the primary is not an  
14 adequate forum as a substitute for the general  
15 election. First of all, the timing is prior to the  
16 identification of the candidates by the nominating  
17 process of the major parties. Second, as in this race,  
18 there are numerous, often dozens of major party  
19 candidates that still have to be selected by the party  
20 for who is going to represent them, and so that if there  
21 is any confusion, which Mr. Johnson identified as the  
22 interest the state is concerned about, it takes place at  
23 the primary, as in this case with 32 Democrats and  
24 Republicans on the ballot along with a single Socialist  
25 Workers Party candidate.



1           The voting machine has no instruction on that  
2 of what even the purpose of the minor party candidate is  
3 on the ballot, and if the minor parties are going to  
4 make a contribution to the election process, it is not  
5 because they are likely to win, but because in the  
6 debate between the representatives of the parties they  
7 have some new ideas and they have a differing point of  
8 view. That is really not relevant.

9           QUESTION: Excuse me. Your brief has a good  
10 deal of that in it. If that is really the criterion,  
11 then your answer to the Chief Justice earlier should  
12 have been different. Then there really would be no  
13 reason to exclude anybody from the ballot. If Socrates  
14 is running alone, without any support whatever, he  
15 should be on the ballot.

16          MR. SMITH: I think that is probably correct  
17 if the state's interest that it is asserting against  
18 Socrates is that the voters would be confused and the  
19 ballot would be crowded, and the Democrats and  
20 Republicans say you cannot be the third candidate on our  
21 ballot because that would confuse the voters and crowd  
22 the ballot, I think Socrates should win in that case.

23          QUESTION: Even if he has no support  
24 whatever. It is just, he is a wise man, he can  
25 contribute to the discussion.

1 MR. SMITH: That's correct.

2 QUESTION: What about the many expressions in  
3 our cases that in fact the state can require that the  
4 people it puts on its ballots have substantial support?  
5 Not that they be wise. Not that they have good ideas to  
6 contribute. But they have substantial support.

7 MR. SMITH: That is because of the experience  
8 that with no requirement whatsoever substantial -- some  
9 modicum of support is a fair requirement to avoid the  
10 problems of ballot crowding and voter confusion, and in  
11 this case we have such a legitimate interest being taken  
12 care of by one mechanism. The question is whether --  
13 how far beyond that, to get the OWL Party, whether you  
14 can employ your shotgun that wipes out every other party  
15 totally off the ballot.

16 QUESTION: That can't be the explanation of  
17 our cases because a much more -- much less restrictive  
18 means of preventing confusion is to have a sliding scale  
19 of the degree of support you need. That is, there will  
20 be 15 slots on the ballot. We will let every party get  
21 on the ballot up to 15. Past 15 it is confusing, but up  
22 to 15 it is not confusing. So I don't care if you get  
23 30 votes. We will still put you on so long as there is  
24 a 15th slot available.

25 Now, we have never required anything like

1 that, so there must be something underlying this beyond  
2 merely confusing the voters. We do require substantial  
3 support.

4 MR. SMITH: Substantial support is not  
5 required as an end in itself, Number One, but Number  
6 Two, if it is of a reasonably low level that it allows,  
7 consistently allows serious minor party candidates to  
8 qualify, then the cases say you haven't met the  
9 threshold of showing -- the first step is showing a  
10 substantial impact on diversity.

11 QUESTION: But I note you have slipped in the  
12 word "serious," "serious minor party." What do you mean  
13 by serious? When you say serious, I immediately think  
14 substantial popular support. Now, what do you mean by  
15 serious? They are Socratic? They are wise people? Or  
16 they have substantial support?

17 MR. SMITH: The record in the State of  
18 Washington is that there are a small number of minor  
19 parties that have regularly qualified candidates for the  
20 ballot, like the Socialist Workers Party, like the  
21 Libertarian Party, and what the legislative history  
22 indicates is that the frivolous parties that were  
23 allegedly targeted were ones with no serious program and  
24 no solutions to offer the people, and the record  
25 indicates that they were specifically irritated by the

1 OWL Party, and unfortunately used an ax when they should  
2 have used a scalpel.

3 QUESTION: Mr. Smith, let me get back again to  
4 something I think I asked you previously. Do I get from  
5 your answers to my questions and some other questions  
6 that a numerical requirement to get on the ballot, a  
7 numerical requirement of support would fail of  
8 constitutional muster, would fail to pass constitutional  
9 muster if parties such as the Socialist Workers Party,  
10 as it has been in Washington, couldn't meet that  
11 requirement, no matter what the requirement was? If it  
12 doesn't let a party like the Socialist Workers Party in  
13 Washington on, it is unconstitutional?

14 MR. SMITH: I would say if it doesn't let any  
15 party -- if, like this case, it lets no party outside  
16 the Democratic and Republican Party qualify for the  
17 ballot, it is clearly unconstitutional if --

18 QUESTION: What if it let the Socialist  
19 Workers Party on but not the Libertarians? They  
20 couldn't quite make the numbers.

21 MR. SMITH: Well, then it would be a harder  
22 case than this one is. Whatever the --

23 QUESTION: How would it come out?

24 MR. SMITH: Well, whatever the number is, it  
25 cannot be zero as a reasonable number.



1 QUESTION: How would that case come out?  
2 Might it be constitutional, a system which allowed the  
3 Socialist Workers Party but not the Libertarian Party  
4 through the use of numbers?

5 MR. SMITH: I'd say if another small party  
6 could meet a, for example, a petition signature  
7 requirement which could be met through reasonable  
8 diligence, then it would be constitutional to say your  
9 failure to exercise that diligence to gather the  
10 relatively reasonable number of signatures that other  
11 small parties are able to gather, then you are  
12 responsible for your own fate. That is not the case we  
13 have here today.

14 QUESTION: May I ask you another question?  
15 You have placed quite a bit of emphasis on the fact  
16 there are two stages that have to be met by your party,  
17 one, a convention, which is rather modest, and then the  
18 1 percent primary requirement. Supposing the state  
19 said, as they do with Democrats and Republicans, anyone  
20 may get on the primary ballot, just eliminate the first  
21 stage, and then your candidate could run simply on that  
22 and have to meet a 1 percent. Would that be  
23 permissible, do you think?

24 MR. SMITH: We suggest that it would not for  
25 the reasons that I mentioned earlier why the primary

1 election is not an adequate forum for minor parties.

2 QUESTION: So your position really is that no  
3 requirement that depends on an independent candidacy  
4 getting a certain number of votes in the primary would  
5 be permissible because the function of a primary is  
6 really to sort out the major party candidates?

7 MR. SMITH: Well, if it was a requirement that  
8 was not so high that it --

9 QUESTION: Well, take Justice Marshall's  
10 example. Say it said 100 votes. You have to get 100  
11 votes in the primary. Or the 200 that you have now for  
12 your convention. Would that be permissible?

13 MR. SMITH: Well, for example, if --

14 QUESTION: I have given you the example.

15 MR. SMITH: Okay.

16 QUESTION: Would that be permissible?

17 MR. SMITH: If it had no substantial  
18 exclusionary effect on all minor parties, that would be  
19 permissible.

20 QUESTION: Well, it would exclude all those  
21 that couldn't get 200 votes.

22 MR. SMITH: Well, as a practical matter I  
23 think that this is a hypothetical question which does  
24 not require answering to decide this case, and it is  
25 unlikely to --

1           QUESTION: It does for me, because I am  
2 wondering whether you are assuming there is some minimum  
3 threshold that could be imposed in a primary. It may be  
4 different in petitions. I understand your argument  
5 about that. Or are you saying that the primary is not  
6 the appropriate vehicle to test the minimum threshold  
7 support, and can never be used? I am just not sure what  
8 your position is.

9           MR. SMITH: I suggest that the primary should  
10 never be --

11           QUESTION: Well, should never. I know it is  
12 not the best. It is constitutionally impermissible to  
13 use a primary which is primarily designed for another  
14 purpose to satisfy this threshold test.

15           MR. SMITH: I'd say it is analogous to the  
16 cases of the Court on filing fees, that there is a less  
17 restrictive alternative of the petition signatures, and  
18 therefore if it has a --

19           QUESTION: Well, there is always going to be a  
20 less restrictive alternative. If you put it at 200, it  
21 could have been 100.

22           MR. SMITH: Well, if the state aims that are  
23 being accomplished are preserving the integrity of the  
24 ballot, then you cannot use a system that heavily  
25 burdens the First Amendment. If a reasonable number of

1 serious minor parties are able to meet the requirement,  
2 then you are not causing the harm of wiping the slate  
3 clean of all but the two major parties and creating a  
4 monopoly.

5 QUESTION: If I understand you correctly, the  
6 constitutional outcome depends on the empirical  
7 results. In other words, the non-statewide candidates  
8 who could get the 1 percent, it is perfectly  
9 constitutional as to them, but it is unconstitutional as  
10 to those who can't pass the threshold.

11 MR. SMITH: That's correct, you have to show  
12 the --

13 QUESTION: So you could have -- this same  
14 provision might have -- it didn't work in Michigan, I  
15 know, but in another state the 1 percent might be okay  
16 if three or four parties could meet the requirement.

17 MR. SMITH: That's correct. You have to show  
18 the harm as applied, and this Court has always said you  
19 have to look at the impact, you can't look at the  
20 abstract. You have to look at the impact, which depends  
21 on the historical record, and so has universally  
22 rejected --

23 QUESTION: Kind of local community standards  
24 for elections.

25 MR. SMITH: Well, this Court has rejected



1 facial challenges and said, you have to look at the  
2 impact on the actual community, and that if a monopoly  
3 is the result, that is impermissible.

4 QUESTION: Mr. Smith, what is the Washington  
5 system as to write-in votes? Suppose your candidate  
6 doesn't make it to the general ballot. I get some  
7 confusion in the briefs as to whether write-in votes are  
8 permissible.

9 MR. SMITH: The Court of Appeals decision  
10 interpreted the Washington statute, which says that an  
11 unsuccessful minor party -- or an unsuccessful primary  
12 participant cannot be a write-in candidate to say that  
13 the write-in was not available and the Court of Appeals  
14 also followed the decisions of this case saying that a  
15 write-in vote is not a constitutionally accepted  
16 alternative to general election ballot placement.

17 The state has argued that this only applies to  
18 major parties, even though there is no specific  
19 limitation in the statutory language, and also the  
20 record indicates that the election results reported by  
21 the Secretary of State show no write-in votes for any of  
22 the offices that they have ever reported the election  
23 results in on the record, and so the inference that can  
24 be drawn from that is either that nobody ever exercises  
25 a write-in vote or the Secretary of State doesn't keep

1 track of them, but in either case they are not a  
2 sufficient substitute for the participation in the  
3 campaign, the debate, and the presentation of their  
4 ideas, in the same way this voters' pamphlet that was  
5 brought up by Mr. Johnson for the first time, there is  
6 no showing of any financial burden on the record here  
7 that to add an extra paragraph to a 30-page pamphlet  
8 would put some burden on the state or would unfairly or  
9 unreasonably subsidize the minor parties by broadening  
10 the choices available to the voters. We suggest that  
11 that is exactly the kind of contribution that minor  
12 parties should be playing in this election campaign.

13 QUESTION: Tell me again, you probably stated  
14 it before, but tell me why the Socialist Workers Party  
15 isn't able to get the requisite votes at the primary.

16 MR. SMITH: Well, historically the record as  
17 pointed out by Mr. Johnson indicates that choosing the 1  
18 percent level, the state has chosen a level that is  
19 higher than 90 percent of the minor parties have ever  
20 been able to get, even in the general election, so they  
21 have chosen a level that is up at the 90th percentile  
22 instead of choosing a level from the record that was  
23 down at the 50th or --

24 QUESTION: That is -- what you say may be  
25 correct, but what I asked you is, why haven't the

1 Socialist Party or the other minor parties been able to  
2 get the requisite votes at the primary?

3 MR. SMITH: Well, first of all, only one-third  
4 of the voters even are interested in enough in the  
5 primary to participate, and those are typically  
6 partisans of one of the major party candidates who care  
7 about what the primary is about, namely, which major  
8 party candidate will get the nomination.

9 QUESTION: Well, that's fine, 1 percent of a  
10 smaller number is a smaller number. I mean, that  
11 doesn't prove anything.

12 MR. SMITH: This is not a randomly selected  
13 smaller number. It is a number selected from partisans  
14 of the major parties.

15 QUESTION: But it is -- the one-third are the  
16 ones that the major parties make an effort to get out.

17 MR. SMITH: That's correct.

18 QUESTION: But the Socialist Workers Party  
19 surely make an effort to get their partisans out, don't  
20 they?

21 MR. SMITH: That's correct, and we are saying  
22 that this is not only unfair in its mode but also that  
23 it should not be required that voters make a commitment  
24 at that primary stage to the Socialist Workers Party  
25 candidate to allow a small number of candidates to

1 participate in the general election, and that --

2 QUESTION: Why shouldn't you be -- why isn't  
3 it fair to say if you -- why don't you just get out your  
4 supporters and hope that they will add up to 1 percent?

5 MR. SMITH: Well, the Socialist Workers Party  
6 has made that effort, and \$1,900 may not be very much,  
7 as Mr. Johnson says, but it is a lot of leaflets, and it  
8 is certainly not a prime time television ad that goes  
9 statewide the way the major parties can put on.

10 QUESTION: And what is wrong with saying if  
11 you can't get your people out you don't get on the  
12 ballot?

13 MR. SMITH: Well, because the first amendment  
14 and the recognized role of minor parties in the election  
15 process does not depend on a large measure of support,  
16 and the abolitionists, the prohibitionists --

17 QUESTION: I know, but the question is whether  
18 the First Amendment requires -- forbids a state to  
19 require a showing of 1 percent.

20 MR. SMITH: And we suggest that if the  
21 interest they assert of confusing the voters and having  
22 ballot crowding is the justification for a monopoly by  
23 the minor parties, then the Court of Appeals was correct  
24 in returning Washington to the system that had worked so  
25 well for 70 years and saying that monopoly is not



1 justified on the record here by any demonstrated history  
2 of ballot crowding and voter confusion, which is the  
3 burden of the state to establish.

4 QUESTION: I suppose you would also say if  
5 Washington said the only minor parties who can get on  
6 the next general election is one that got 1 percent of  
7 the vote at the last general election, that would be  
8 unconstitutional, too.

9 MR. SMITH: That would perpetuate the  
10 monopoly, especially when there is the reasonable  
11 alternative in the convention and petitions.

12 QUESTION: Even though there's a lot of people  
13 out at the general election.

14 MR. SMITH: Well, because they have been  
15 excluded from the general election, there is no way they  
16 can get the 1 percent at the general election and it is  
17 a closed door for the minor parties.

18 QUESTION: Thank you, Mr. Smith.

19 Mr. Johnson, did you have something more to  
20 say? You have four minutes remaining.

21 ORAL ARGUMENT BY JAMES M. JOHNSON, ESQ.,

22 ON BEHALF OF THE APPELLANT - REBUTTAL

23 MR. JOHNSON: Just a moment, please, to  
24 correct an answer I gave Justice Stevens, that  
25 consideration of the number of candidates printed in the

1 voters' pamphlet was discussed in the Washington  
2 legislature, Justice Stevens, and is reprinted at Page  
3 A2 of our reply brief, the note that this effect  
4 retroactively analyzed would have been to cut down the  
5 number of candidates from 65 to 50 in that printing.

6 The argument here appears to want to escalate  
7 the Washington convention requirement to another  
8 "barrier" -

9 QUESTION: May I just ask, 65 to 50, are these  
10 all statewide candidates?

11 MR. JOHNSON: No, they are not, as I responded  
12 to the first question.

13 QUESTION: So there is a different pamphlet  
14 for each election district?

15 MR. JOHNSON: There is a different pamphlet by  
16 each Congressional District.

17 QUESTION: By each Congressional District.

18 MR. JOHNSON: Yes, Justice Stevens.

19 QUESTION: I see.

20 MR. JOHNSON: In fact, the convention  
21 requirement in Washington is the equivalent of a  
22 petition. First, the convention requirement was not  
23 challenged below at all, as you can see from the  
24 complaint. Secondly, the District Court found that this  
25 party's convention was a "street corner convention."

1 The attachments to C13, an affidavit of the party, show  
2 the candidates standing on a street corner in Seattle  
3 conducting their convention, and the point is, that is  
4 all right with Washington. We do not have any separate  
5 barrier through convention at the de minimis 200 voter  
6 requirement.

7 Finally, I think we should consider the  
8 alternatives that are clearly and constitutionally  
9 available to Washington. The Jenness versus 5 percent  
10 requirement would work an obligation to get 122,000  
11 signatures to qualify for the Washington ballot as  
12 contrasted with the 9,000 for a Governor's race in  
13 Washington and a sliding scale actually which we  
14 impose. The 1 percent is applied to each office,  
15 working your way down the ballot, and is much less, of  
16 course, for local offices, and this is why Washington  
17 legislative positions and local offices, the minor  
18 parties have always been successful in qualifying for  
19 the general election.

20 One percent is not a large requirement to  
21 dictate substantial support. Any other kind of method,  
22 Mr. Smith suggests we use a scalpel, but any content  
23 control requirement to discern frivolous parties would,  
24 I submit, be unconstitutional, so a numerical  
25 requirement is required constitutionally. The 1 percent

1 imposed by the Washington statute is reasonable and  
2 easily reached by a diligent party. Therefore we  
3 conclude the Washington statute is constitutional and  
4 ought to be upheld.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
6 Johnson. The case is submitted. We will resume there  
7 at 1:00 o'clock.

8 (Whereupon, at 12:03 p.m., the case in the  
9 above-entitled matter was submitted.)  
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CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-656 - RALPH MUNRO, SECRETARY OF STATE OF WASHINGTON, Appellant V.

SOCIALIST WORKERS PARTY. ET AL.

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

BY Paul A. Richardson

(REPORTER)