SUPREME COURT OF THE UNITED STATES

No. 91–535

ALAN B. BURDICK, PETITIONER *v.* MORRIS TAKUSHI, DIRECTOR OF ELECTIONS OF HAWAII, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 8, 1992]

JUSTICE KENNEDY, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

The question before us is whether Hawaii can enact a total ban on write-in voting. The majority holds that it can, finding that Hawaii's ballot access rules impose no serious limitations on the right to vote. Indeed, the majority in effect adopts a presumption that prohibitions on write-in voting are permissible if the State's ballot access laws meet constitutional standards. I dissent because I disagree with the presumption, as well as the majority's specific conclusion that Hawaii's ban on write-in voting is constitutional.

The record demonstrates the significant burden that Hawaii's write-in ban imposes on the right of voters such as petitioner to vote for the candidates of their choice. In the election that triggered this lawsuit, petitioner did not wish to vote for the one candidate who ran for state representative in his district. Because he could not write in the name of a candidate he preferred, he had no way to cast a meaningful vote. Petitioner's dilemma is a recurring, frequent phenomenon in Hawaii because of the State's ballot access rules and the circumstance that one party, the Democratic Party, is predominant. It is critical to understand that petitioner's case is not an isolated example of a

restriction on the free choice of candidates. The very ballot access rules the Court cites as mitigating his

injury in fact compound it systemwide.

Democratic candidates often run unopposed, especially in state legislative races. In the 1986 general election, 33 percent of the elections for state legislative offices involved single candidate races. Reply Brief for Petitioner 2–3, n.2. The comparable figures for 1984 and 1982 were 39 percent and 37.5 percent. *Ibid*. Large numbers of voters cast blank ballots in uncontested races, that is, they leave the ballots blank rather than vote for the single candidate listed. In 1990, 27 percent of voters who voted in other races did not cast votes in uncontested state Senate races. Brief for Common Cause/Hawaii, as *Amicus Curiae* 15–16. Twenty-nine percent of voters did not cast votes in uncontested state house races. *Id.*, at 16. Even in contested races in 1990, 12 to 13 percent of voters cast blank ballots. *Id.*, at 16–17.

Given that so many Hawaii voters are dissatisfied with the choices available to them, it is hard to avoid the conclusion that at least some voters would cast write-in votes for other candidates if given this option. The write-in ban thus prevents these voters from participating in Hawaii elections in a meaningful manner.

This evidence also belies the majority's suggestion that Hawaii voters are presented with adequate electoral choices because Hawaii makes it easy to get on the official ballot. To the contrary, Hawaii's ballot access laws taken as a whole impose a significant impediment to third-party or independent candidacies. The majority suggests that it is easy for new parties to petition for a place on the primary ballot because they must obtain the signatures of only one percent of the State's registered voters. This ignores the difficulty presented by the early deadline for gathering these signatures: 150 days (5 months) before the primary election. Meeting this deadline requires considerable organization at an early stage in the election, a condition difficult for many small parties to meet. See Brief for Socialist Workers Party as *Amicus Curiae* 10–11, n.4.

If the party petition is unsuccessful or not completed in time, or if a candidate does not wish to be affiliated with a party, he may run as an independent. While the requirements to get on the nonpartisan ballot are not onerous (15 to 25 signatures, 60 days before the primary), the nonpartisan ballot presents voters with a difficult choice. This is because each primary voter can choose only a single ballot for all offices. Hence, a voter who wishes to vote for an independent candidate for one office must forgo the opportunity to vote in an established party primary in every other race. Since there might be no independent candidates for most of the other offices, in practical terms the voter who wants to vote for one independent candidate forfeits the right to participate in the selection of candidates for all other offices. This rule, the very ballot access rule that the Court finds to be curative, in fact presents a substantial disincentive for voters to select the nonpartisan ballot. A voter who wishes to vote for a third-party candidate for only one particular office faces a similar disincentive to select the third-party's ballot.

The dominance of the Democratic Party magnifies the disincentive because the primary election is dispositive in so many races. In effect, a Hawaii voter who wishes to vote for any independent candidate must choose between doing so and participating in what will be the dispositive election for many offices. This dilemma imposes a substantial burden on voter choice. It explains also why so few independent candidates secure enough primary votes to advance to the general election. As the majority notes, only eight independent candidates have succeeded in advancing to the general election in the past 10 years. That is, less than one independent candidate per year on average has in fact run in a general election in Hawaii.

The majority's approval of Hawaii's ban is ironic at a

time when the new democracies in foreign countries strive to emerge from an era of sham elections in which the name of the ruling party candidate was the only one on the ballot. Hawaii does not impose as severe a restriction on the right to vote, but it imposes a restriction that has a haunting similarity in its tendency to exact severe penalties for one who does anything but vote the dominant party ballot.

Aside from constraints related to ballot access restrictions, the write-in ban limits voter choice in another way. Write-in voting can serve as an important safety mechanism in those instances where a late-developing issue arises or where new information is disclosed about a candidate late in the race. In these situations, voters may become disenchanted with the available candidates when it is too late for other candidates to come forward and qualify for the ballot. The prohibition on write-in voting imposes a significant burden on voters, forcing them either to vote for a candidate whom they no longer support, or to cast a blank ballot. Write-in voting provides a way out of the quandary, allowing voters to switch their support to candidates who are not on the official ballot. Even if there are other mechanisms to address the problem of late-breaking election developments (unsuitable candidates who win an election can be recalled), allowing write-in voting is the only way to preserve the voters' right to cast a meaningful vote in the general election.

With this background, I turn to the legal principles that control this case. At the outset, I agree with the first premise in the majority's legal analysis. The right at stake here is the right to cast a meaningful vote for the candidate of one's choice. Petitioner's right to freedom of expression is not implicated. His argument that the First Amendment confers upon citizens the right to cast a protest vote and to have government officials count and report this vote is not persuasive. As the majority points out, the purpose

of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression.

I agree as well with the careful statement the Court gives of the test to be applied in this case to determine if the right to vote has been constricted. As the Court phrases it, we must "weigh `the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against `the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration `the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Ante*, at 5, quoting *Tashjian* v. *Republican Party of Connecticut*, 479 U. S. 208, 213–214 (1986). I submit the conclusion must be that the write-in ban deprives some voters of any substantial voice in selecting candidates for the entire range of offices at issue in a particular election.

As a starting point, it is useful to remember that until the late 1800's, all ballots cast in this country were write-in ballots. The system of state-prepared ballots, also known as the Australian ballot system, was introduced in this country in 1888. See L. E. Fredman, The Australian Ballot: The Story of an American Reform ix (1968). Prior to this, voters prepared their own ballots or used preprinted tickets offered by political parties. Since there were no state-imposed restrictions on whose name could appear on a ballot, individuals could always vote for the candidates of their choice.

State-prepared ballots were considered to be a progressive reform to reduce fraudulent election practices. The pre-printed ballots offered by political parties had often been in distinctive colors so that the party could determine whether one who had sold his vote had used the right ballot. Fredman, *supra*, at 22. The disadvantage of the new ballot system was that it

could operate to constrict voter choice. In recognition of this problem, several early state courts recognized a right to cast write-in votes. See, for example, *Sanner* v. *Patton*, 155 Ill. 553, 562–564, 40 N.E. 290, 292–293 (1895) ("[I]f the construction contended for by appellee [prohibiting write-in voting] be the correct one, the voter is deprived of the constitutional right of suffrage; he is deprived of the right of exercising his own choice; and where this right is taken away there is nothing left worthy of the name of the right of suffrage-–the boasted free ballot becomes a delusion"); *Patterson* v. *Hanley*, 136 Cal. 265, 270, 68 P. 821, 823 (1902) ("Under every form of ballot of which we have had any experience the voter has been allowed—and it seems to be agreed that he must be allowed—the privilege of casting his vote for any person for any office by writing his name in the proper place"); and *Oughton* v. *Black*, 212 Pa. 1, 6–7, 61 A. 346, 348 (1905) ("Unless there was such provision to enable the voter, not satisfied to vote any ticket on the ballot, or for any names appearing on it, to make up an entire ticket of his own choice, the election as to him would not be equal, for he would not be able to express his own individual will in his own way").

As these courts recognized, some voters cannot vote for the candidate of their choice without a write-in option. In effect, a write-in ban, in conjunction with other restrictions, can deprive the voter of the opportunity to cast a meaningful ballot. As a consequence, write-in prohibitions can impose a significant burden on voting rights. See *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government"). For those who are affected by write-in bans, the infringement on their right to vote for the candidate of their choice is total. The fact that write-

in candidates are longshots more often than not makes no difference; the right to vote for one's preferred candidate exists regardless of the likelihood that the candidate will be successful. *Socialist Labor Party* v. *Rhodes*, 290 F. Supp. 983, 987 (SD Ohio), ("A write-in ballot permits a voter to effectively exercise his individual constitutionally protected franchise. The use of write-in ballots does not and should not be dependent on the candidate's chance of success"), aff'd in pt., modified in pt. *sub nom.*, *Williams* v. *Rhodes*, 393 U. S. 23 (1968).

Based on the foregoing reasoning, I cannot accept the majority's presumption that write-in bans are permissible if the state's ballot access laws are otherwise constitutional. For one thing, this presumption is circular, for we must consider the availability of write-in voting, or the lack thereof, as a factor in determining whether a state's ballot access laws considered as a whole are constitutional. *Jenness* v. *Fortson*, 403 U. S. 431, 438 (1971); *Storer* v. *Brown*, 415 U. S. 724, 736, n.7 (1974). The effect of the presumption, moreover, is to excuse a state from having to justify or defend any write-in ban. Under the majority's view, a write-in ban only has constitutional implications when the state's ballot access scheme is defective and write-in voting would remedy the defect. This means that the state needs to defend only its ballot access laws, and not the write-in restriction itself.

The majority's analysis ignores the inevitable and significant burden a write-in ban imposes upon some individual voters by preventing them from exercising their right to vote in a meaningful manner. The liberality of a state's ballot access laws is one determinant of the extent of the burden imposed by the write-in ban; it is not, though, an automatic excuse for forbidding all write-in voting. In my view, a state that bans write-in voting in some or all elections must justify the burden on individual voters

by putting forth the precise interests that are served by the ban. A write-in prohibition should not be presumed valid in the absence of any proffered justification by the State. The standard the Court derives from *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), means at least this.

Because Hawaii's write-in ban, when considered in conjunction with the State's ballot access laws, imposes a significant burden on voters such as petitioner, it must put forward the state interests which justify the burden so that we can assess them. I do not think it necessary here to specify the level of scrutiny that should then be applied because, in my view, the State has failed to justify the write-in ban under any level of scrutiny. The interests proffered by the State, some of which are puzzling, are not advanced to any significant degree by the write-in prohibition. I consider each of the interests in turn.

The interest that has the best potential for acceptance, in my view, is that of preserving the integrity of party primaries by preventing sore loser candidacies during the general election. As the majority points out, we have acknowledged the States' interest in avoiding party factionalism. A write-in ban does serve this interest to some degree by eliminating one mechanism which could be used by sore loser candidates. But I do not agree that this interest provides "adequate justification" for the ban. *Ante*, at 10. As an initial matter, the interest can at best justify the write-in prohibition for general elections; it cannot justify Hawaii's complete ban in both the primary and the general election. And with respect to general elections, a write-in ban is a very overinclusive means of addressing the problem; it bars legitimate candidacies as well as undesirable sore loser candidacies. If the State desires to prevent sore loser candidacies, it can implement a narrow provision aimed at that particular problem.

The second interest advanced by the State is

enforcing its policy of permitting the unopposed victors in certain primaries to be designated as officeholders without having to go through the general election. The majority states that "[t]his would not be possible, absent the write-in voting ban." *Ante*, at 11. This makes no sense. As petitioner's counsel acknowledged during oral argument, "[t]o the degree that Hawaii has abolished general elections in these circumstances, there is no occasion to cast a write-in ballot." Tr. of Oral Arg. 14. If anything, the argument cuts the other way because this provision makes it all the more

important to allow write-in voting in the primary elections because primaries are often dispositive.

Hawaii justifies its write-in ban in primary elections as a way to prevent party raiding. Petitioners argue that this alleged interest is suspect because the State created the party raiding problem in the first place by allowing open primaries. I agree. It is ironic for the State to raise this concern when the risk of party raiding is a feature of the open primary system the State has chosen. The majority suggests that write-in voting presents a particular risk of circumventing the primary system because state law requires candidates in party primaries to be members of the party. Again, the majority's argument is not persuasive. If write-in voters mount a campaign for a candidate who does not meet state law requirements, the candidate would be disqualified from the election.

The State also cites its interest in promoting the informed selection of candidates, an interest it claims is advanced by "flushing candidates into the open a reasonable time before the election." Brief for Respondent 44. I think the State has it backwards. The fact that write-in candidates often do not conduct visible campaigns seems to me to make it *more* likely that voters who go to the trouble of seeking out these candidates and writing in their names are well informed. The state interest may well cut the other way.

The State cites interests in combating fraud and enforcing nomination requirements. But the State does not explain how write-in voting presents a risk of fraud in today's polling places. As to the State's interest in making sure that ineligible candidates are not elected, petitioner's counsel pointed out at argument that approximately 20 States require write-in candidates to file a declaration of candidacy and verify that they are eligible to hold office a few days before the election. Tr. of Oral Arg. 13.

In sum, the State's proffered justifications for the

write-in prohibition are not sufficient under any standard to justify the significant impairment of the constitutional rights of voters such as petitioner. I would grant him relief.