

FILE

Subject

Electors -
Certificate of Nominations
Independent Party

STATE OF KANSAS

Office of the Attorney General

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Attorney General

May 29, 1974

Opinion No. 74- 164

Honorable Elwill M. Shanahan
Secretary of State
2nd Floor -- The Statehouse
Topeka, Kansas 66612

Dear Secretary Shanahan:

K.S.A. 25-303 states in pertinent part thus:

"Independent nominations of candidates for any office to be filled by the voters of the state at large may be made by nomination papers signed by not less than twenty-five hundred (2,500) qualified voters of the state for each candidate

"Independent nominations of candidates for offices to be filled by the voters of a county, district or other division less than a state may be made by nomination papers signed by not less than five percent (5%) of the qualified voters of such county, district or other division voting for secretary of state at the last preceding general election for each candidate, and in no case to be signed by less than twenty-five (25) voters of such county, district or division, for each candidate.

"Independent nominations of candidates for offices to be filled by the voters of a township may be made by nomination papers signed by not less than five percent (5%) of the qualified voters of such township, computed as above provided, for each candidate, and in no case to be signed by less than ten (10) such voters of such township for each candidate."

The validity of the requirement that nomination papers for independent candidates for offices to be filled by the voters of a county, district or other division less than the state, be signed

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by "not less than five percent (5%) of the qualified voters" of such area voting at the last preceding general election for secretary of state, is questioned on the ground that in the instance, e.g., of a candidate for election as representative of the First Congressional District, a total of 9,162 signatures is required, whereas only 2,500 signatures is required for an independent nomination for statewide office.

In Jenness v. Fortson, 403 U.S. 431 (1970), the Court considered certain Georgia provisions prescribing access of independent candidates or candidates of "political bodies," political organizations whose candidates received less than 20% of the vote at the most recent gubernatorial or presidential election, to ballot position. Thereunder, a nominee of a "political body," or an independent candidate, could have his name printed on the ballot at the general election by filing a nominating position which must be signed by "a number of electors of not less than five per cent of the total number of electors eligible to vote in the last election for the filling of the office the candidate is seeking" The requirement was challenged on two separate but related grounds, first, that to require a nonparty candidate to secure the signatures of a certain number of voters before his name may be printed on the ballot is to abridge the freedom of speech and association guaranteed to that candidate and his supporters by the First and Fourteenth Amendments, and secondly, that to require a nonparty candidate to secure the signatures of 5% of the voters before printing his name on the ballot while printing the names of those candidates who have won nominations in party primaries, violates the Fourteenth Amendment by denying the nonparty candidate the equal protection of the laws.

The Court found that the Georgia statutory scheme did not, unlike that of Ohio considered in Williams v. Rhodes, 393 U.S. 23, favor two established political parties -- Republican and Democrat -- and afford them a virtually complete monopoly. The Court in that earlier case had found that "Ohio, through an entangling web of election laws, has effectively foreclosed its presidential ballot to all but Republican and Democrat." 393 U.S. at 35. In Jenness, the Court stated thus:

"But the Williams case, it is clear, presented a statutory scheme vastly different from the one before us here. Unlike Ohio, Georgia freely provides for write-in votes. Unlike Ohio, Georgia does not require every candidate to be the nominee of a political party, but fully recognizes independent candidacies. Unlike Ohio, Georgia does not fix an unreasonably early filing deadline for candidates not endorsed by established parties. Unlike Ohio, Georgia does not impose upon a small party or a new party the Procrustean requirement

of establishing elaborate primary election machinery. Finally, and in sum, Georgia's election laws, unlike Ohio's do not operate to freeze the political status quo. In this setting we cannot say that Georgia's 5% petition requirement violates the Constitution."

The Court went on to reject the claim that it is "inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than it is to win the votes of a majority in a party primary." The Court pointed out that "[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a . . . candidate on the ballot -- the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." 403 U.S. at 442. It should be pointed out here, that a petition requirement of signatures of 5% of the eligible electorate is a greater requirement than that set forth in K.S.A. 25-303, which requires only 5% of the number voting for the secretary of state at the last preceding general election. Given the general rule that fewer than 70% of eligible registered voters actually cast their votes at any given election, the Kansas requirement is to that extent less stringent than that approved in Jeness v. Fortson, supra.

Similarly, in American Party of Texas v. White, decided March 26, 1974, by the United States Supreme Court, the Court reiterated thus:

"[R]equiring independent candidates to evidence a 'significant modicum of support' is not unconstitutional. Demanding signatures equal in number to 3 to 5% of the vote in the last election is not invalid on its face"

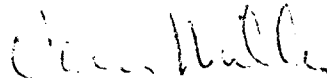
The Kansas statutory scheme evidences no discriminatory treatment of independent candidates as such. However, it is argued that independent candidates for offices to be filled by voters of a county, district or other division are discriminatorily required to obtain a greater percentage of signatures of the electorate than are independent candidates for state office. Thus, an independent candidate for governor is required to obtain not less than 2,500 signatures, whereas an independent candidate for United States congressman from the First Congressional District is required to obtain not less than 9,162 signatures. As the Court pointed out in American Party of Texas v. White, supra, "'Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution.'" The percentages of

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signatures required for petitions for independent nominations for statewide and other offices do differ. A greater percentage is required for nominations for district and county offices. However, the 5% requirement is not itself unduly and unconstitutionally burdensome, as the cases cited above make clear. Neither is the requirement of 2,500 signatures required for independent nomination for election to statewide office. The differing requirements do not reflect any effort to discriminate against independent candidates as such. Although the requirements do differ, neither is in and of itself unconstitutional. Similarly, we do not think the greater requirement, permissible on its face, is invalid merely because a lesser one is prescribed for a different office. Indeed, the Kansas statutory scheme in this respect is similar to that of Texas, as set out at footnote 7 of the opinion in American Party of Texas v. White, supra.

Accordingly, we conclude that the signature requirements of K.S.A. 25-303 are not discriminatory, as suggested in the letter which you enclose.

Yours very truly,



VERN MILLER
Attorney General

VM:JRM:jsm