

November 11, 1986

Mr. Justice:

Re: No. 86-656, Munro v. Socialist Workers Party

According to my notes, your conference vote on this case was a tentative reversal. I think the opinion Justice White has circulated is basically acceptable, although I do have two concerns.

First, throughout most of the opinion, Justice White uses the language that a State can condition access to a ballot "on a showing of a modicum of voter support," see p. 7, or a "significant modicum" of voter support, see p. 9. The first formulation seems fine to me. The second is an odd combination of words (because the definition of "modicum" is "a small or moderate amount or quantity, adding the word "significant" to that seems slightly counter-intuitive), but that language is picked up directly from Jenness, 403 U.S. at 442 (there is a state interest in "requiring some preliminary showing of a significant modicum of support"), and I think one can live with it. But on the top of p. 5, Justice White cites American Party of Texas, 415 U.S., at 782 n. 14 as holding that "a state may require a preliminary showing of significant support." In fact, the footnote in American Party of Texas was a direct quote from Jenness, and so it actually stated "preliminary showing of a significant modicum of support." Justice White then quotes the footnote from Anderson v. Celebrezze, 460 U.S., at 788-789, n. 9, that the State has an "undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on

the ballot . . . , " and adds: "We reaffirm that principle today."

✓ Anderson did include that language, but it is in a footnote and it is not part of or necessary to its holding. (Anderson, an opinion by Stevens, joined by Burger, Brennan, Marshall, and you, actually struck down an Ohio restriction on ballot eligibility; this footnote was talking about what the case did not concern.) In addition, I think Anderson is the only opinion that departs from the "modicum of support" or "significant modicum of support" language. From the rest of Justice White's opinion, and from the number of times he refers solely to the term "modicum of support," it is clear that all that is necessary for the holding in this case is a statement that a State can require a "modicum" or "significant modicum" of support. Before joining this opinion, therefore, I would recommend asking Justice White to revise what he has on the top of page 5 so that he uses the exact language from Jenness and American Party (rather than the reformulation as it appears in Anderson), and states that he is reaffirming the principle as described in those two opinions.

Second, I think the main issue in this case is whether the burden imposed on the minor parties' First Amendment rights are too severe to be justified by the State's interest in restricting access. The fact is that, prior to the 1977 amendments, virtually every minor-party candidate who sought a general election ballot position qualified, while after the amendments were passed, only one minor-party candidate has managed to make it onto the ballot. See opinion at 7-8. Justice White says that

such historical facts "are relevant, but they prove very little in this case, other than the fact that §29.118.110 does not provide an insuperable barrier to minor-party ballot access." (P. 7) I am not sure that is the main lesson I would draw from this fact. Although Justice White does have a point that the historical data is shaped by the fact that prior to the amendments "there were virtually no restrictions on access" (although the State did have, as it still does, a convention requirement), I still am somewhat uncomfortable with the almost "inexorable zero" that this system seems to create.

The extent of the burden on First Amendment rights should also have, I believe, an effect on Justice White's analysis on pgs 5-6. I completely agree that, in a case where a State is simply requiring a showing of a modicum of support and there is no dramatic effect on participation, there should be no need for a State to make particularized showings of the existence of voter confusion or ballot overcrowding. But when the effect, and thus the burden on First Amendment rights, is more substantial, perhaps that changes what the Court should require of the State. I am not convinced Justice White is wrong, but I do think it is a somewhat difficult issue.

In any case, because your vote on this case was a tentative reversal, you might want to wait and see what Justice Marshall's dissent has to say on this issue before joining the majority. If you think Justice White has dealt with the burden issue sufficiently, then the only thing I would recommend is the change in the language on p. 5.

Chai

*It may be best to leave it
unchanged as is.*