

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NEW YORK STATE BOARD OF :

4 ELECTIONS, ET AL., :

5 Petitioners :

6 v. : No. 06-766

7 MARGARITA LOPEZ TORRES, :

8 ET AL. :

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10 Washington, D.C.

11 Wednesday, October 3, 2007

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10: 02 a.m.

16 APPEARANCES:

17 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of
18 Petitioners New York State Board of Elections, et al.

19 ANDREW J. ROSSMAN, ESQ., New York, N.Y.; on behalf of
20 Petitioners New York County Democratic
21 Committee, et al.

22 FREDERICK A.O. SCHWARZ, JR., ESQ., New York, N.Y.; on
23 behalf of Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case 06-766, New York State Board of Elections v. Torres.

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON.

ON BEHALF OF PETITIONERS NEW YORK STATE

BOARD OF ELECTIONS, ET AL.

MR. OLSON: Mr. Chief Justice, and may it please the Court:

For 10 years, New York relied on political party primaries to nominate general election candidates for supreme court justice, but that process discouraged qualified candidates and spawned unseemly, expensive, and potentially corrupting fundraising by judicial candidates.

So the legislature substituted an indirect party primary system at which delegates are elected who, in turn, select general election candidates at political party conventions.

The Second Circuit concluded that the delegate convention statutes enabled political parties to exercise too much influence at the expense of the insurgent party members or insurgent candidates and

1 struck those statutes down as facially unconstitutional
2 and reinstated the discredited primary process.

3 The issue in this case is whether the
4 delegate-convention system is facially unconstitutional
5 because it allows party leaders to defeat the
6 aspirations of party insurgents.

7 States have broad, as this case has
8 repeatedly held -- broad constitutional latitude to
9 prescribe the time, place, and manner of elections,
10 particularly elections for State office.

11 JUSTICE KENNEDY: Just focus on, if you
12 would, Mr. Olson, on the election for the delegates.

13 Now, suppose it were shown -- a hypothetical
14 case -- that it's extremely difficult to get on that
15 ballot. You need, let's say, 2,000 signatures in 30
16 days. Would there be a constitutional issue raised by
17 that situation?

18 MR. OLSON: Well, in the first place, as you
19 know, Justice Kennedy, that -- that is not the case
20 here. It takes 500 signatures --

21 JUSTICE KENNEDY: A hypothetical case.

22 MR. OLSON: If it were an impossible burden
23 to get on the ballot, I still don't think that First
24 Amendment associational rights would be involved.

25 JUSTICE KENNEDY: What about Kusper, the

1 Kusper case?

2 MR. OLSON: I don't think the Kusper case
3 goes that far, Justice Kennedy. I think that, as the
4 cases of this Court --

5 JUSTICE KENNEDY: I think we have made it
6 very clear that if you're going to use a primary system,
7 you can't have such burdensome registration requirements
8 that the primary system is not, to all intents and
9 purposes, to all intents and purposes open to those who
10 wish to participate.

11 MR. OLSON: I think that the other factor
12 that is involved here is that, provided that there is
13 reasonable access to the general election, which is
14 another factor in this case, then the constitutional
15 rights to associate are satisfied.

16 JUSTICE KENNEDY: So you think that in
17 Kusper, if -- if there was reasonable access to a
18 general election, you can structure and stifle the
19 primary any way --

20 MR. OLSON: Well, I think that --

21 JUSTICE KENNEDY: I'm just looking at the
22 principle here, and it may be that you'll say that
23 there's no burden here, et cetera. But I just want to
24 know: Isn't there a constitutional principle that we
25 are entitled and we must look at the fairness of the

1 primary system insofar as participation of the voters?

2 MR. OLSON: I think that the case that maybe
3 best answers that is the Munro case, in which the State
4 of Washington's practice -- and there was a different
5 practice of the State of Washington before this Court
6 earlier this week. But at that point in time the
7 process was that there was an open blanket primary,
8 which was not held unconstitutional at that point, where
9 the major candidates -- the one and two positions of the
10 major candidates of each of the political parties would
11 get on the ballot, and then the Socialist Party was
12 complaining because it took 1 percent of the votes of
13 the primary process to get on the general election
14 ballot.

15 This Court held that that -- that that was
16 not an impossible burden, and that -- the principle from
17 that case and the other cases, the American political --
18 American Party of Texas v. White and so forth, the
19 Court's jurisprudence has held that, as long as there is
20 reasonable access for a candidate or a political party
21 to the general election process, then it does not have
22 to be provided in that level in the primary.

23 CHIEF JUSTICE ROBERTS: Is it right to
24 regard the election of delegates here as a primary
25 election?

1 My understanding, of course, is that that
2 simply elects -- it doesn't get you on the ballot. It
3 elects delegates who then exercise the choice. Do you
4 think our primary election cases are transferable to
5 this situation?

6 MR. OLSON: Well, I think there are two
7 answers to that. Your primary election cases talk in
8 terms of, the ones that have been mentioned in the
9 briefs here, talk particularly in terms of protection
10 under the Equal Protection Clause.

11 This is -- it's called a primary, but it's
12 an election of delegates by party members that -- and
13 then, when those delegates get together, they go to the
14 convention. So I'm not sure that the nomenclature makes
15 so much difference as this is a process that the State
16 has allowed the party to implement to choose its
17 leadership. The Court has repeatedly held that there is
18 no point in the process --

19 JUSTICE SCALIA: The State has not allowed
20 it. The State has required it, no?

21 MR. OLSON: Yes, the State requires it, but
22 it --

23 JUSTICE SCALIA: Although if we -- if we
24 hold it unconstitutional for the State to require it, I
25 suppose it would also be unconstitutional for the State

1 merely to allow it, wouldn't it? So that this manner of
2 selecting judges in any other State, if it has been
3 voluntarily adopted by the party, would be
4 unconstitutional?

5 MR. OLSON: That's the principle that the
6 Respondents in the Second Circuit advance. It would
7 strike down the conventions, because conventions are, by
8 definition, selections of individuals to represent the
9 broader constituency at a subsequent --

10 JUSTICE KENNEDY: Just to make it clear, is
11 it your position that, with reference to this election
12 for delegates, the State can make it as burdensome as it
13 chooses on those who wish to put themselves forward on
14 the ballot as a proposed delegate?

15 MR. OLSON: I think, Justice Kennedy, as
16 long as the system in the State provides a reasonable
17 access to candidates and political parties to the
18 election process, that there is not a First Amendment
19 right with respect to the primary process or the
20 preliminary process, which in this case includes both
21 the so-called delegate selection primary --

22 JUSTICE SCALIA: What if -- what if it were
23 the parties that objected to this and not some
24 individual who said, I'm not being given enough voice in
25 the party? What if the parties said, we don't want to

1 select our candidates this way? Is it clear that the
2 State could impose it upon them?

3 MR. OLSON: It's clear the State has the
4 right, and this Court has said so in the American Party
5 of Texas v. White, that the State can require either a
6 primary election or a convention. The Court
7 specifically addressed that. In fact, what the Court
8 said: It is too plain for argument that a State may
9 insist that intraparty competition be settled by primary
10 or convention. That's the holding of that Court --

11 JUSTICE GINSBURG: That convention --
12 conventions can come in all sizes and shapes. The
13 argument here is that this system shuts out
14 rank-and-file party members and gives the total control
15 to the party leaders, and that the preliminary was the
16 primary or selection of delegates, but it's really a
17 sham because nobody is going to run for that except the
18 party faithful, someone picked by the party boss.

19 So the argument on the other side is
20 that this system, as complicated as it is, reduces to
21 the party leaders choose the candidates.

22 MR. OLSON: Well, what this Court has said
23 in the California Republican Party v. Jones case, a cite
24 quoting the Eu case, the Eu case that the Court had
25 decided before, is that the political party has the

1 right to select its leadership, to select its nominating
2 process, to select its candidates, and to exclude
3 members. So, Justice Ginsburg, the party has the right,
4 even arbitrarily, as long as the Fourteenth Amendment is
5 not violated in an election context, to exclude members
6 of its party.

7 JUSTICE SCALIA: Well, the State can
8 restrict that right if it wants to. The State can
9 require the party to select its candidates by -- by
10 primary.

11 MR. OLSON: By primary or -- or by
12 convention.

13 JUSTICE SCALIA: Or by convention.

14 MR. OLSON: Right.

15 JUSTICE SCALIA: But if the State wants to
16 do it by smoke -- if the party wants to do it by
17 smoke-filled room, the State can say, if it wishes to
18 say, you can't do it by smoke-filled room.

19 MR. OLSON: It can, Justice Scalia, but the
20 State must respect the rights of the political parties
21 in determining who their leaders and candidates must be.

22 JUSTICE SCALIA: Well, but that -- but
23 that's not the issue here. The State and the party are
24 in agreement.

25 MR. OLSON: Yes. Yes.

1 JUSTICE SCALIA: The State is not trying to
2 coerce the party into doing something that it doesn't
3 want to do.

4 MR. OLSON: Yes, I totally agree with you.
5 But I'm answering hypothetical questions with respect to
6 something else. What this Court has said, that this
7 Court vigorously protects the special place the First
8 Amendment reserves for the protection by which a party,
9 political party, selects a standard-bearer. Selecting a
10 candidate is selecting the person that will communicate
11 the party's interests --

12 JUSTICE GINSBURG: So the party is -- you're
13 identifying the party with the party leader because the
14 argument comes down to this is not the rank and file
15 that's making this election; this is the party leader;
16 and the party might like that or the leadership might
17 like that, but the rank and file might not, and the
18 argument is that they have rights of association, too.

19 MR. OLSON: Well, they have rights of
20 association, but they have -- they have associated in a
21 political party which has elected leadership which makes
22 decisions, Justice Ginsburg.

23 They do not have a right to belong to the
24 Democratic Party or the Republican Party. The rank and
25 file, so forth -- the definition of "insurgent," which

1 is at the other side of the table here, are people that
2 are rebelling against the duly elected leadership of the
3 political party.

4 JUSTICE KENNEDY: But if there is a
5 State-mandated primary, I thought it's basic law that
6 the State may not place unduly restrictive barriers to
7 participation in that primary. I think that's a given,
8 it seems to me. Now, tell me if I'm wrong --

9 MR. OLSON: I may be --

10 JUSTICE KENNEDY: And then we can argue
11 about whether the burden is too great here, which it may
12 not be.

13 MR. OLSON: Let me say, Justice Kennedy,
14 that I may be wrong in terms of what this Court's
15 decisions stand for with respect to ultimately allowing,
16 as far as associational rights are concerned,
17 individuals and parties access to the total electorate.
18 But even if your premise is correct that there must be
19 an open access in a reasonable way to either the -- to
20 both the primary and the general election, then this
21 process is reasonable. It's not unreasonably difficult
22 for a person to participate.

23 Let me say -- let me enumerate the ways. An
24 individual, a rank-and-file member, can campaign and
25 vote for delegates. An individual might become a

1 delegate himself by -- or herself, by getting 500 names
2 on a signature, and that's far below what this Court has
3 indicated before was -- was an acceptable level of
4 requirement of access to the ballot. An individual can
5 attempt to form delegate slates, can attempt to persuade
6 the delegates, can -- the individual can form or switch
7 parties.

8 In this case the Respondent Lopez Torres,
9 actually in the 2003 election, became a candidate at the
10 general election for supreme court justice of the
11 Working Families Party, and she did that without giving
12 up her registration and membership in the Democratic
13 Party. She was in that election and she lost.
14 Finally, and this is even if she hadn't been able to
15 secure the nomination of that political party, she could
16 run in the general election. There's access to -- it
17 takes 3500 to 4,000 signatures to run as an independent
18 body in the general election.

19 So there is way after way after way for
20 individuals in New York to participate in the election
21 process.

22 So in answer to your question,
23 Justice Kennedy, to the extent that your statement of
24 the principle with respect to access to both the primary
25 and the general election is -- is the law of this Court,

1 then that access exists here.

2 But I come back to the point that political
3 parties have the greatest possible latitude -- yes,
4 Justice Scalia, that the Court has upheld certain
5 restrictions with respect to how the nominee of the
6 party gets selected. But the Court has also said that
7 when the party is in that process, its powers and rights
8 and First Amendment freedoms to elect the
9 standard-bearer, to select the standard-bearer, are at
10 their apogee, because the person selected as a
11 candidate, whether that person might be the most
12 favorable person to the rank and file, the duly elected
13 leadership of the political party might decide, well,
14 that person really isn't qualified to be a supreme court
15 justice even --

16 JUSTICE SCALIA: Have we -- have we imposed
17 any such restrictions on our own, as opposed to merely
18 upholding restrictions that were imposed by the State?
19 That is to say, have we held that the Constitution
20 itself imposes certain restrictions?

21 MR. OLSON: Except in the context of
22 analyzing what State requirements have been?

23 JUSTICE SCALIA: Yes. I want a case where
24 the State did not impose the restriction and it was up
25 to us to decide whether the State could do that or not,

1 but rather the State said the party can do whatever it
2 wants, and we have disallowed what the party itself
3 chose under no compulsion from the State --

4 MR. OLSON: Aside --

5 JUSTICE SCALIA: -- on the basis of some
6 constitutional principle apart from the Equal Protection
7 Clause --

8 MR. OLSON: Yes. The only cases --

9 JUSTICE SCALIA: -- or the Thirteenth
10 amendment.

11 MR. OLSON: The only cases that I would
12 submit, that I'm aware of, that would answer that would
13 be Equal Protection Clause cases, because the --
14 these -- the political party is a group of people that
15 decide to form together because of common beliefs. In
16 the -- that is the maximum freedom that we allow for
17 associations.

18 With all the business about smoke-filled
19 rooms and things like that, people have the right to
20 decide, make decisions --

21 JUSTICE KENNEDY: Do you think a political
22 party could say, you can't vote in our primary unless
23 you've been a member of our party for 4 years?

24 MR. OLSON: Yes, Justice Kennedy. I -- I
25 don't -- in an association --

1 JUSTICE KENNEDY: This would be a
2 State-mandated party primary for --

3 MR. OLSON: Well, a party might --

4 JUSTICE KENNEDY: -- election --

5 MR. OLSON: A party would -- there's two
6 questions there. If the party wants to have a 4-year
7 requirement before you can be a part of that
8 association, I can't understand what the First Amendment
9 associational right would be.

10 JUSTICE STEVENS: Well, what about --

11 MR. OLSON: If the State imposed that, the
12 party could say, well, that's unreasonable; we want to
13 open -- in fact, the Court decided this by saying that
14 the --- the party who wanted to could allow independents
15 to vote.

16 If I might, Mr. Chief Justice, may I reserve
17 --

18 JUSTICE STEVENS: Didn't Justice Kennedy
19 asked if the Kasper case was correctly decided?

20 MR. OLSON: Well, I'm not -- I think I tried
21 to answer that the best I could by saying that I think
22 the import of the cases, without getting into the
23 specifics of that, are that if you have a reasonable
24 access by individuals or political parties to the
25 electoral process, that satisfies the Constitution.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Olson.

3 Mr. Rossman.

4 ORAL ARGUMENT OF ANDREW J. ROSSMAN
5 ON BEHALF OF PETITIONERS NEW YORK COUNTY
6 DEMOCRATIC COMMITTEE ET AL.

7 MR. ROSSMAN: Mr. Chief Justice, and may it
8 please the Court:

9 I'd like to begin by responding to
10 Justice Kennedy's question regarding the election of
11 delegates and fairness for voters. There are two
12 responses: In this case that I have -- this case, there
13 was conceded below that the requirement for delegates of
14 getting only 500 signatures was no barrier at all.

15 And secondly, I would say that in
16 considering that question, Justice Kennedy, the
17 important thing is to consider what is the intended role
18 that the State gives to the participants in this
19 process? And what the role here is that individual
20 voters have the opportunity to vote for local delegates
21 who are to represent their interests at the convention.
22 As Cousins instructs, once they have the opportunity to
23 pull a lever for the delegate that shares their values
24 and their preferences, their right of suffrage is
25 satisfied.

1 What they do not have, what Respondents and
2 what the lower courts would like to have exist but
3 doesn't exist and isn't required under the Constitution,
4 is the opportunity for rank-and-file voters to vote
5 directly for the candidates at the nomination stage, and
6 that's the difference between a delegate-based
7 convention and a primary.

8 If we agree, and I think the Court would
9 agree, that there is no right to a primary -- that's
10 something, in fact, that's conceded in this case; there
11 is no constitutional right to a primary -- then there is
12 no State requirement that there be a direct opportunity
13 for association between voter and candidate at the
14 nomination phase; that it is perfectly appropriate and
15 constitutional for that association to be between voter
16 and delegate, and the voters then rely on their locally-
17 elected delegates to advance their interest in the
18 convention process.

19 That's the difference between a convention
20 and a primary. We think it's a critical one here. So
21 the cases --

22 JUSTICE GINSBURG: In practice, how many
23 people other than the slate selected by the party
24 leaders run in New York for this delegate position?

25 MR. ROSSMAN: In New York City, the evidence

1 below was that approximately 12 to 13 percent of
2 delegate slates are contested. What we suggest is that
3 the availability of a contest is the key. It's not the
4 frequency of the contest, because there's also evidence
5 in the record that for open primaries for civil court,
6 which is the closest parallel, that those are only
7 contested 28 percent of the time.

8 So the fact that an election is not
9 contested, that there may be voter apathy out there,
10 that there may be party unity that causes people to
11 rally behind the parties and their leadership, is not a
12 constitutional problem.

13 JUSTICE BREYER: The theory of this, I take
14 it, is that, just as you said, voters elect convention
15 delegates, and those convention delegates choose the
16 official nominee, say, of the Democratic Party. So that
17 nominee goes on to the final ballot.

18 MR. ROSSMAN: Correct.

19 JUSTICE BREYER: Well, what then of the fact
20 that the convention delegates when they meet won't let
21 people who would like the position of the judge appear
22 before them?

23 MR. ROSSMAN: Well, that is not the general
24 case in the State of New York.

25 JUSTICE BREYER: It's not?

1 MR. ROSSMAN: But even if it is, the
2 important thing is not that individual candidates appear
3 to politic before the delegates, it's that delegates
4 have the freedom under the statute to vote for whatever
5 candidate they like. There's evidence that there's
6 legislative intent that, in fact, candidates not appear
7 at the convention because it would be unseemly for them
8 to do so.

9 JUSTICE BREYER: Well then, how are the
10 delegates to find out the qualifications? In other
11 words, if that's the intent of this statute, then you
12 have a statute that's designed on the one hand to have
13 convention delegates who will choose, and on the other
14 hand to prevent the convention delegates from finding
15 out the qualifications of the different applicants, in
16 which case it would seem to be a statute that would give
17 the actual power of selection to the leader or the
18 chairman -- I forget the title -- of the Democratic
19 Party. And I don't know about the constitutionality of
20 that or not. In other words, go ahead.

21 MR. ROSSMAN: Let me respond to the most
22 difficult part of your question first, which is the
23 constitutionality of the party leader selecting a
24 candidate we think is not troublesome at all. In fact,
25 there are many instances in New York and in other States

1 where the political leaders, through their structure, do
2 pick the candidates, for example in the case of vacancy
3 election, which this Court upheld as constitutional in
4 the Rodriguez case.

5 But the question that I think that you're
6 asking is, is there some denial of voter or delegate
7 education, and does that pose a constitutional problem?
8 We have here a bare statutory framework and the
9 statutory framework does not in any way, shape, or form
10 preclude the ability of delegates to become educated
11 about the candidates. Within that bare statutory
12 framework. The parties themselves, through what we
13 contend is core associational activity protected by the
14 First Amendment, participate in their own way of
15 choosing in educating delegates and in putting forth the
16 candidacies of judicial -- potential judicial nominees.

17 CHIEF JUSTICE ROBERTS: I suppose that the
18 State can make the judgment that it's more likely that
19 the delegates would be informed about the qualifications
20 of candidates for judgeship than voters?

21 MR. ROSSMAN: In fact, we think that is the
22 very judgment that the State has made here. And when,
23 as Mr. Olson said, when it went from a primary to a
24 convention process, the idea behind it in part was that
25 the delegates could be more educated, would be expected

1 to be more educated than rank-and-file voters would be
2 about judges. And the evidence in this case is that
3 rank-and-file voters are not educated hardly at all
4 about the judge candidates that they select. So we
5 think this is clearly a legislative sensible policy
6 choice to put the selection process in the hands of
7 those who have the motivation and the opportunity to
8 become more educated about those that they're selecting.

9 Now, one thing that needs to be recalled in
10 this process is, of course, it is not merely a State-run
11 election. As -- as the Court observed in Jones, it is a
12 party affair, too. So there are core First Amendment
13 rights of the parties themselves that attach.

14 And the question -- I think in response to
15 Justice Ginsburg's question about whether there's
16 confusion between the party leaders and the parties, it
17 is our reading of the Eu, Tashjian and Jones cases that
18 the Court has recognized that parties have a structure
19 and have the core constitutional right to create their
20 own structure, and their leadership can make choices for
21 the parties. So they can choose to endorse candidates,
22 for example. They can choose to associate or not
23 associate with particular individuals. And that's a
24 choice that's made here by duly elected leaders of the
25 parties.

1 And if there's a problem with that, the
2 remedy for that problem is in the political arena. The
3 remedy is for the rank-and-file voters to vote their
4 party leaders out when they come up for election if they
5 adopt a process that they don't like or they think
6 squelches the input of the rank-and-file members.

7 So the reason that -- the reason why that's
8 not happening here, we believe, could be attributable to
9 one of two things. It could be attributable to apathy,
10 which the Constitution does not have a prerogative to
11 stamp out, or it could be attributable to party unity
12 and the fact that leaders are sensitive to who will be
13 best to advance the interests of their rank-and-file
14 members. But we don't think there's a constitutional
15 problem with that.

16 JUSTICE GINSBURG: But if the autonomy of
17 the party and, let's say, the leader is the
18 justification for this, the party -- how -- how
19 autonomous can a party be when it's told, even if you
20 want to be more democratic about how you choose your
21 candidates, you can't because New York is forcing this
22 system on you?

23 MR. ROSSMAN: Well, the only system that New
24 York is forcing is a bare framework for representative
25 democracy. It's a convention. It's no different than

1 --

2 JUSTICE SCALIA: Well, the parties are not
3 protesting in this case, are they?

4 MR. ROSSMAN: Absolutely not.

5 JUSTICE SCALIA: If and when that situation
6 arises, I suppose we can -- we can decide it. But it's
7 not here. The parties are totally happy with this and
8 would do it on their own.

9 MR. ROSSMAN: We absolutely agree. The
10 parties intervened from the outset of this case, both
11 major parties, because they share the view that the
12 system is better than a primary would be, and they
13 believe that their right --

14 JUSTICE SCALIA: In fact, it is probably
15 likely the parties got this system adopted by the New
16 York legislature.

17 MR. ROSSMAN: Well, however the legislative
18 process has unfolded, in 1921, multiple times since, and
19 to the present when the legislature filed an amicus
20 brief with the Second Circuit, the legislature has
21 clearly been in support of this. And we think it's
22 within -- it's a core State power, it's a sensible
23 legislative choice that they have made. It's within
24 the contours of *American Party of Texas v. White*, which
25 recognized, as Justice Scalia observed moments ago, that

1 the State can choose to have primaries or conventions.

2 Where the State has chosen to have
3 conventions, party rights attach to that. And the one
4 thing that the lower court did that we urge the Court to
5 consider to be quite inappropriate was to apply strict
6 scrutiny to what is routine core party associational
7 activity. Leaders developing candidacies, recommending
8 candidates, endorsing candidates, and fielding delegates
9 who they think are loyal to the interests of the party,
10 that doesn't deserve strict scrutiny. At worst, we
11 think there's no burden here to the rank-and-file voters
12 to force them to participate in the party's own
13 convention. But even if there were some burden, at
14 worst, we think that there are countervailing rights
15 here. And where there are countervailing rights the
16 Court should prefer to the legislative expertise here,
17 and the expertise -- thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 Mr. Rossman.

20 Mr. Schwarz.

21 ORAL ARGUMENT OF FREDERICK A.O. SCHWARZ, JR.

22 ON BEHALF OF RESPONDENTS

23 MR. SCHWARZ: Mr. Chief Justice, and may it
24 please the Court:

25 On a robust record, the district court,

1 confirmed in great detail by the Second Circuit, found
2 that there were severe burdens placed upon insurgents
3 and placed upon party members who wished to band
4 together to support a candidate.

5 JUSTICE KENNEDY: What about the burden on a
6 single delegate wanting to be on the ballot? I think
7 that requires 500 votes, and there was no specific
8 finding that that was burden, was there? Or am
9 incorrect?

10 MR. SCHWARZ: Two --there was no specific
11 finding that was a burden, you're correct. I have two
12 additional points to make.

13 First, if you look at John Dunne's amicus
14 brief, John Dunne was a Republican leader in the State
15 of New York. He was chairman of the judiciary committee
16 for many years in the State Senate. And he on page 19
17 of his brief describes how it was impossible even for
18 him to get admitted as a delegate, and it wasn't
19 worthwhile to try and be a lone gadfly.

20 Secondly, the courts analyzed the burden in
21 terms of the difficulty of assembling and running a
22 slate of delegates, a slate that cut across the various
23 assembly districts, and the court found --

24 JUSTICE ALITO: Assuming that the plaintiffs
25 have associational rights at stake here, isn't this a

1 case where there's a conflict between two associational
2 -- two sets of rights of association? You have the
3 party hierarchy who wants to, in your own words, fence
4 out the insurgents. That's a right not to associate.
5 And then you have the insurgents who want to be fenced
6 in?

7 MR. SCHWARZ: Well, the --

8 JUSTICE ALITO: Isn't that different from
9 the cases that you rely on?

10 MR. SCHWARZ: I -- I think not, Your Honor,
11 because I think if you think about the question of do
12 the party leaders have the right to stifle the voices of
13 ordinary members, one should conclude no, and it's very
14 different from your decision in Jones.

15 JUSTICE ALITO: But that's charged language:
16 They have the right to stifle.

17 MR. SCHWARZ: Okay.

18 JUSTICE ALITO: The insurgents, do they not
19 -- does not the right of association include the right
20 not to associate?

21 MR. SCHWARZ: I think, Your Honor, the right
22 of association does not include the right to use an
23 election system imposed by the State which makes it
24 impossible. That's where the burden comes from. It's
25 because the State has imposed this system on every

1 party. So I do not think there is a countervailing
2 right on the other side.

3 JUSTICE KENNEDY: What are your -- what are
4 you best cases for that proposition?

5 MR. SCHWARZ: In the -- I would say in the
6 first place I'd have to start out by saying there's not
7 the case on all fours like this. The -- then I would
8 say that's quite clear why that would be, because
9 there's no system like this in the United States and
10 never has been.

11 The -- I guess I would say after that point,
12 that the cases -- first, there are principles in your
13 cases. There's a principle being worried about the
14 effect of State laws serving to entrench power. That's
15 a theme that runs through all your cases.

16 Secondly, there is in your cases the --
17 many, many cases that hold what's important is to make a
18 realistic assessment of how a statute actually works.

19 Now, having said those two points by way
20 of -- three points by way of preliminary, first, there's
21 nothing on all fours and really you wouldn't expect it,
22 then what are cases that I think are -- that bite in our
23 favor? Well, there are principles in the cases.

24 I would start with Storer and Storer says in
25 assessing severe burden what you want to look at is the

1 -- is the realistic effect of whether people have gotten
2 on the ballot. And Storer says if you find that happens
3 rarely, while it's not conclusive, it's the -- it's
4 indicative that there is a severe burden.

5 JUSTICE GINSBURG: But Storer --

6 CHIEF JUSTICE ROBERTS: Isn't that a general
7 election case?

8 JUSTICE SCALIA: That's a general election
9 case, isn't it?

10 MR. SCHWARZ: Well, but the principles of
11 whether the election, general election cases and the
12 primary cases should apply, it seems to me are the same
13 principles. The root principles that apply are the same
14 ones.

15 CHIEF JUSTICE ROBERTS: Well, let me ask you
16 about that.

17 MR. SCHWARZ: Please.

18 CHIEF JUSTICE ROBERTS: Let's suppose the
19 State doesn't think that direct voter election of judges
20 is a good idea, that it thinks there ought to be some
21 insulation to avoid the problems of judges campaigning
22 and raising money and all that; yet, at the same time
23 they want some participation by the voters in the
24 process. Is there any way they can achieve that
25 objective, to have the nominees actually chosen not by

1 the voters but by a convention, and yet have some role
2 by the voters?

3 MR. SCHWARZ: There absolutely is, Your
4 Honor. We do not claim here that any convention is
5 inappropriate. Conventions are appropriate.

6 CHIEF JUSTICE ROBERTS: No, I'm just asking
7 is there a way to have a convention with some role by
8 the voters or the party --

9 MR. SCHWARZ: Yes, Your Honor, as long as
10 that convention does not set up severe barriers to
11 people competing; and I would say even if you look at
12 the Board of Elections' own --

13 CHIEF JUSTICE ROBERTS: Well, doesn't that
14 seem kind of odd, that if a State can have no role for
15 voters, it can have a pure convention, that they're
16 penalized if they have some role for voters?

17 MR. SCHWARZ: I wouldn't put it as being
18 penalized, Your Honor. I think it is the --

19 CHIEF JUSTICE ROBERTS: Being found
20 unconstitutional is a pretty severe penalty.

21 (Laughter.)

22 MR. SCHWARZ: But it's what we seek and we
23 think the courts below appropriately granted, Your
24 Honor. The -- but it's not penalizing the State for
25 doing something; it's saying if do you this, and if you

1 severely burden, as after an extensive fact-finding
2 hearing the court held the statutes do, then you have to
3 show that there's a compelling justification.

4 JUSTICE SCALIA: Mr. Schwarz -- I'm sorry,
5 go ahead.

6 JUSTICE SOUTER: The, the problem that I
7 have in the analogy you are drawing on the application
8 of your principle based on the general election cases is
9 this: There is concededly -- and you mentioned this
10 earlier -- there is concededly no unreasonable barrier
11 to somebody who wants to become a delegate. He's got to
12 get 500 signature, but that can be done. The burden
13 that I understand that your clients are complaining
14 about is the, in effect, the burden of influencing the
15 ultimate decision-maker to decide to nominate that
16 person.

17 And that burden is -- is focused on two
18 points: number one, the entrenched power of the
19 political bosses; and number two, the difficulty --
20 well, I guess three points -- the difficulty of
21 fielding, for a dissident to field a whole slate of
22 candidates who in effect, once elected, would make the
23 nomination desired; or, three, the capacity of the
24 intending or the aspiring candidate to influence the
25 delegates directly once they're selected, because the

1 time is short.

2 And those aren't -- those aren't, it seems
3 to me, complaints about access to the electoral process.
4 They're complaints about the capacity to influence those
5 who are elected, who make the ultimate decision. And
6 that's the difficulty I have in the analogy that you are
7 drawing or the parallel that you are making between the
8 direct election cases and your claim here. Could you
9 comment on that?

10 MR. SCHWARZ: Yeah. I guess I want to make
11 two comments. First, it seems to me the principles that
12 are in your direct election cases, and also primary
13 cases like Kusper and the Panish v. Lubin or Lubin v.
14 Panish, where the Court took the language in your
15 Williams case about you ought to be worried if there are
16 multiple parties competing, clamoring for a place on the
17 ballot, and said, well, that should also apply -- this
18 Court said that should also apply in a primary context
19 where there are multiple people seeking to -- to attain
20 a nomination.

21 Now, should it matter because here the
22 primary or the election -- it's really an election but
23 the State happens to call it a primary -- should it
24 matter that that is in the preliminary stage, in the
25 nomination stage?

1 I would suggest it should not.

2 Now, I think your --

3 JUSTICE SOUTER: But it's still the case
4 that at the end of the day, the nub of your claim is
5 that the intending judicial candidate cannot effectively
6 politic, does not have a reasonable chance of getting
7 selected; and I don't see that as a -- as a direct
8 ballot access claim.

9 Let me put the question in another way:
10 Your -- your friend on the other side, Mr. Rossman, in
11 response to a question, said that if this election of
12 the judicial candidate for the party were made directly
13 by the political bosses, whatever their titles are, the
14 ones who are supposedly in control here, he would not
15 see any constitutional objection to that.

16 What if New York had a system that provided
17 precisely for that? The political bosses, as I
18 understand it, get elected every 2 years and the State
19 law would provide that those party bosses, whatever
20 their title is, would in fact select the candidate.
21 Would that be unconstitutional?

22 MR. SCHWARZ: I think I would like to draw a
23 distinction between the law as I think you've described
24 it and a different law that Justice Scalia described. I
25 think the law that Justice Scalia described would be

1 constitutional. If what the State did is to say, you
2 the party decide on what to do, I think the State is
3 then not putting a thumb on the scale; the State is not
4 interfering with the disputes within the party.

5 However, on the statute that I think you
6 described, Justice Souter, where the State says, we
7 decree that for every party the leader shall make the
8 decision, I think that would be unconstitutional because
9 the State has no business intervening in the --

10 JUSTICE SOUTER: But the party isn't
11 objecting.

12 MR. SCHWARZ: Well, Your Honor, I think
13 that's --

14 JUSTICE SOUTER: The party -- the party
15 likes it.

16 MR. SCHWARZ: I'm sure the party likes it.

17 JUSTICE SOUTER: And you are the -- the
18 claim here: These people are not, as I understand it,
19 bringing a case on behalf of rights of the party.
20 They're bringing a case based on a premise of a
21 principle of participation, which is theirs.

22 And that's why, it seems to me, that the
23 hypo that I posed is not significantly different,
24 provided the parties aren't objecting, in which we have
25 a different case.

1 But it seems to me that my hypo is not
2 significantly different from the one that gave rise to
3 the question that Mr. Rossman answered.

4 MR. SCHWARZ: Well, the -- first, on the
5 consent of the party leaders, which is really what we
6 have here, of course they are -- they like the system
7 because the State system entrenches them.

8 And -- and this Court --

9 JUSTICE SOUTER: Well, the Federal system in
10 practice entrenches United States Senators.

11 I'm -- I'm not sure that, in terms of
12 political participation on the part of an intending or
13 an aspiring judge that the system that I suggested in
14 the hypo, in which the party bosses select the nominee,
15 is for constitutional purposes significantly different
16 from the Federal system for -- for picking district
17 judges.

18 MR. SCHWARZ: Well, because the Federal
19 system provides that there shall not be elections. Here
20 elections --

21 JUSTICE SOUTER: Sure. And in my hypo the
22 only election is the election for the party boss.

23 MR. SCHWARZ: Well, I would still suggest,
24 Your Honor, that, as we see the case that would be
25 unconstitutional. But our case is much stronger than

1 that because, in any event, there is here an election
2 for delegates.

3 JUSTICE SOUTER: Okay. But isn't your
4 argument still that, because there is a limitation on
5 the participation of the intending judicial candidate,
6 there is ultimately a constitutional problem?

7 So let me pose a different question to you,
8 and this one is not hypothetical. The nub of your case
9 is that the political bosses in effect are controlling
10 the process because they tell the delegates who to vote
11 for. Does your -- does the intending judicial nominee
12 whom you represent have any difficulty in getting to the
13 political bosses and saying: I want you to consider me?

14 MR. SCHWARZ: Yes. They would not listen to
15 her, and they said: We won't listen to you in this
16 particular case; we won't listen to you because you
17 declined to hire an unqualified person as your law
18 clerk.

19 JUSTICE SOUTER: Sure. They -- for
20 political reasons, they're saying: We don't like you.
21 There are -- there are a lot of people who go to United
22 States Senators, and the United States Senators say:
23 Scram; we don't -- we don't like you; your politics
24 aren't good enough for us.

25 And so I'm not saying that -- that -- on my

1 hypo the person who lobbies the bosses directly is --is
2 claiming a right to success. I think they're claiming a
3 right to have a chance to influence the process. And
4 why don't they have the chance by going to the boss?

5 MR. SCHWARZ: Well, Your Honor, let me try
6 two things. First, that never has worked. And it -- it
7 has to be -- at least using the Storer analysis of what
8 actually happens, the fact that never in the history of
9 New York, not in the Republican Party, not in the
10 Democratic Party, not in New York City, not in upstate,
11 never has someone who was opposed by the party boss been
12 able to become a judge.

13 JUSTICE SOUTER: And I don't know of
14 any enemy of a United States -- go ahead.

15 JUSTICE SCALIA: The person wouldn't be
16 opposed if he approached the boss and the boss said:
17 Yeah. Boy, I really like you. That person would
18 automatically not be a rebel. He'd be part of the
19 establishment.

20 (Laughter.)

21 MR. SCHWARZ: But the -- you know, this
22 isn't an issue that divides by ideology. It's --
23 really, the question here is if you have a statute that
24 makes it difficult for the voters to participate, to
25 have a voice. That's really the question. And if I

1 could use something that the Board of Elections' brief
2 conceded in both their reply and their opening brief,
3 they said a person -- they said that party members who
4 wanted to attempt to assemble a slate to try to
5 influence the decision at the convention would be "well
6 served" -- that's their exact words -- to assemble and
7 run a slate. But the district court and the circuit
8 court found that it was impossible -- severely
9 burdensome, actually impossible -- for that burden to be
10 met.

11 JUSTICE STEVENS: May I ask you this
12 question, Mr. Schwarz. Supposing that the statute did
13 not contain the delegate-selection process and instead,
14 said: Delegates shall be selected by the county
15 chairman in each county and by the organization. Would
16 it then be unconstitutional?

17 MR. SCHWARZ: If it said delegates will be
18 selected --

19 JUSTICE STEVENS: By party officials.

20 MR. SCHWARZ: I'm not sure about that. I'm
21 not -- I think that -- I'm not sure. I think it's
22 different than Justice Souter's hypothetical.

23 JUSTICE STEVENS: I'm just saying just
24 eliminate this whole folderol about picking delegates
25 and say the county chairman shall pick the delegates,

1 period. I don't see why that would be unconstitutional.

2 MR. SCHWARZ: I'm not sure I have a position
3 on that one way or the other. What I do say, though, is
4 this Court in your Minnesota Republican Party v. White
5 decision said it makes -- and, you know, the question of
6 whether judges should be elected or appointed is a
7 controversial question. But this Court in that decision
8 said that if you're going to have an election -- and
9 here we have elections for delegates -- if you're going
10 to have an election, you shouldn't structure that
11 election in a way that makes it in that case extremely
12 difficult or impossible or forbidden --

13 JUSTICE STEVENS: Mr. Schwarz, you're
14 talking about the election of the judge or the election
15 of the delegate? I think you're mixing two oranges and
16 apples there.

17 MR. SCHWARZ: Well, the -- I do believe that
18 the election of the delegates raises the constitutional
19 questions about has the State put its thumb on the
20 scale, has the State done something that severely
21 burdens the voters.

22 JUSTICE STEVENS: It -- the evidence shows
23 the thumb on the scale is just as strong as if the party
24 chairman picked the delegates. And, therefore, it seems
25 to me, it presents the question of whether it would be

1 unconstitutional to enact a statute that allows the
2 party chairman to pick the delegates.

3 MR. SCHWARZ: I'm not sure, Your Honor.

4 JUSTICE BREYER: Well, if you're not sure,
5 it's difficult --

6 JUSTICE KENNEDY: If I could interrupt,
7 Justice Breyer, for just a moment. But in the Minnesota
8 case the thumb on the scale was to deprive the
9 constituents of a First Amendment right. Smith v.
10 Allwright, it was a right not to be discriminated
11 against race. Here what we're asking is: What is the
12 substantive right?

13 MR. SCHWARZ: Well, I think here it is the
14 right not to be burdened, severely burdened, in an
15 election. And that just runs through all your cases --

16 JUSTICE SOUTER: No, but what you are
17 calling -- and correct me if I am wrong. Maybe I
18 misunderstand this. I think what you are calling the
19 severe burden is the difficulty of assembling a whole
20 slate that can control the meeting or have a majority in
21 the ultimate meeting of that delegate, of those
22 delegates, and therefore actually select the candidate
23 who wants to put the slate together. And it's control
24 over result rather than the capacity of any individual
25 to get elected a delegate which I think you are

1 objecting to. Am I wrong?

2 MR. SCHWARZ: We have never said that
3 there's a right to win. We have only said there's a
4 right to meaningfully participate.

5 JUSTICE SOUTER: Yes, but when you say
6 "meaningfully participate" you talk about putting -- and
7 candidly talk about putting -- a slate of delegates
8 together.

9 If I put a slate of delegates together, it
10 is because once those delegates are selected they're
11 going to support me; and that's why it -- I think your
12 real argument is not that somebody has difficulty
13 becoming a candidate for a delegate or even getting
14 elected one. The difficulty that you're claiming is
15 that it's hard for the intending judicial candidate to
16 assemble a large enough group of people to give that
17 candidate success once the delegates are elected. It's
18 a success argument that you are making, not an access
19 argument.

20 MR. SCHWARZ: No. It's a compete argument,
21 not an access argument. And I do think the Constitution
22 should be read to say that if the State passes laws that
23 make it very hard for voters to band together or for
24 insurgent candidates to compete, then -- and it is a
25 severe burden, they have to justify it. And, by the

1 way, they haven't sought in their papers to justify it.

2 JUSTICE GINSBURG: Could a State decide it
3 doesn't want candidates to have any part in this
4 delegate-selection process? It thinks it's unseemly to
5 have would-be judges engage in that kind of activity.
6 So it structures the system that says that they choose
7 delegates for a convention, but we don't want those
8 delegates to be the delegates of any particular
9 candidate. We want to insulate this process from
10 would-be candidate influence. Would that be
11 unconstitutional?

12 MR. SCHWARZ: The problem is that in the
13 real world the statutes work to entrench the power of
14 the party leaders and to prevent voters from, to use the
15 Board of Elections' reply brief, I think, on page 5, to
16 use -- or 17, to use -- the voters are not able to band
17 together to try and influence the results at the
18 conventions.

19 JUSTICE SCALIA: Of course not. You're
20 really arguing against the whole purpose this scheme,
21 which is not to have judges popularly elected. And
22 you're saying no, we want them popularly elected. The
23 purpose of the scheme is to -- is to have the people
24 elect delegates and have delegates use their good
25 judgments as to who -- as to who the best judge would

1 be. But you say, no, we want the people to have an
2 input. I mean, it's contrary to the whole purpose of
3 the scheme. Of course it works the way you say it does.
4 It is designed to work that way. It's a basic judgment
5 not to have judges popularly elected, and your objection
6 amounts to saying no, judges ought to be popularly
7 elected.

8 MR. SCHWARZ: We -- we have no problem with
9 the convention, but we don't think that the -- either
10 the insurgent candidate or the band of voters who wish
11 to support that person should be, by the State, fenced
12 out, severely burdened from attempting to --

13 CHIEF JUSTICE ROBERTS: But it's all right,
14 I take it, if they don't prevail? For example --

15 MR. SCHWARZ: Yes.

16 CHIEF JUSTICE ROBERTS: -- the other side
17 says that your argument is -- is implicated whenever a
18 convention leads to a different nominee than the
19 primary.

20 MR. SCHWARZ: No, that's -- that's not --

21 CHIEF JUSTICE ROBERTS: You don't think
22 there's anything wrong with the convention deciding that
23 the nominee is going to be someone other than the person
24 who would prevail in the primary election.

25 MR. SCHWARZ: There is nothing wrong with

1 that, Your Honor.

2 CHIEF JUSTICE ROBERTS: So it's all right to
3 fence them out to that extent?

4 MR. SCHWARZ: If you want -- if we want to
5 call that fencing. I don't call that fencing. That's
6 the -- if the convention is one that is put together
7 without the State burdening the ability for people to
8 get involved --

9 CHIEF JUSTICE ROBERTS: I take it, in
10 evaluating the burden, we should look at how difficult
11 it is for someone to be elected a delegate.

12 MR. SCHWARZ: I think you should also look
13 at the -- since the party leaders run slates and they
14 have no difficulty in running slates because -- for
15 various reasons that the courts found, I think you
16 should look at the question of slates as well as
17 individual delegates. And in considering individual
18 delegates, I do think that Mr. Dunne's amicus brief
19 which describes, on his page 19, indicates that, you
20 know, it's -- it's a little unrealistic to think that
21 anybody other than --

22 CHIEF JUSTICE ROBERTS: Well, is that
23 because Mr. Dunne was not supported by the party members
24 at the convention --

25 MR. SCHWARZ: No, he wasn't --

1 CHIEF JUSTICE ROBERTS: -- for whatever
2 higher office --

3 MR. SCHWARZ: He wasn't trying to be a
4 judge, Your Honor. He -- he speaks about his desire to
5 be a delegate and his being told that, you're not
6 sufficiently reliable; we're not going to let you be a
7 delegate.

8 CHIEF JUSTICE ROBERTS: What did he have to
9 do to become on the ballot for delegate?

10 MR. SCHWARZ: If he wanted to be a single
11 person running -- appearing as a gadfly --

12 CHIEF JUSTICE ROBERTS: 500 signatures,
13 right?

14 MR. SCHWARZ: He needs the 500 signatures.

15 CHIEF JUSTICE ROBERTS: If we don't think
16 that's a sufficient burden, do you lose?

17 MR. SCHWARZ: I think we have a difficult
18 case, if you don't think that's sufficient burden. If
19 you think --

20 JUSTICE KENNEDY: But the State -- the trial
21 court didn't find that that was a burden.

22 MR. SCHWARZ: No, I -- I'm not -- I'm
23 agreeing with the Chief Justice that I think that, if
24 you thought that just running for one delegate slot was
25 sufficient to solve the problem of a State statute that

1 was designed -- their words, their admission -- to
2 entrench the power of the party leaders, I think that
3 gives us a problem.

4 JUSTICE BREYER: Why? I mean I don't see
5 how you avoid answering Justice Stevens's hypothetical?
6 The reason I think you have to answer it is because the
7 New York system is the system he described in the
8 hypothetical, with a safety valve.

9 MR. SCHWARZ: The safety valve being?

10 JUSTICE BREYER: The safety valve being that
11 the party leaders cannot just choose anybody. I mean,
12 if it looks they're going to choose something really
13 nutty, then there will be opposition to these delegates
14 and something will happen.

15 MR. SCHWARZ: Well --

16 JUSTICE BREYER: So they have leeway, but
17 you can't go too far.

18 MR. SCHWARZ: The record, Your Honor, and
19 this is an extensive record, shows that the party
20 leaders can choose and do choose people who are, to use
21 your word, who are --

22 JUSTICE BREYER: You don't like that.
23 That's why I say you have to answer it. If you feel
24 that that's so terrible, then you say no, the
25 Constitution forbids that, though you'd have to explain,

1 wouldn't you, why, with all its faults, that is not
2 better in the judgment of New York than a system where
3 people raise \$4 million from the lawyers in order to run
4 for office?

5 MR. SCHWARZ: We -- no, we -- we have not
6 said that there needs to be a primary. We haven't said
7 that. And sometimes our opponents leave the impression
8 that we have said that. We haven't said that.

9 You know, there are -- get rid of the
10 leaders --

11 JUSTICE GINSBURG: That's the -- that's the
12 remedy that, the temporary remedy, that you sought was
13 -- at the bottom line, the court's order was, until New
14 York reacts to this decision, the candidates will be
15 chosen by primary.

16 MR. SCHWARZ: Yes, the -- but the judge,
17 Your Honor -- the judge did two things in imposing that
18 remedy, three or four things actually:

19 He said, first, I'm not going to
20 micromanage. I think the statutes are unconstitutional.
21 I'm not going to get into all the details of fixing it
22 because the Legislature should do that and the Federal
23 courts shouldn't do that.

24 Second, he relied on the fact that the
25 fall-back position in the State statutes is there is a

1 primary if there is no other system in place.

2 But, third and most important, he stayed his
3 decision to give the Legislature time to address the
4 question, and they were well on their way to addressing
5 it when this Court gave us the opportunity to be here.

6 CHIEF JUSTICE ROBERTS: Do you agree it's
7 not realistic that one way they would address it is by
8 having an entirely appointed system?

9 MR. SCHWARZ: No, they -- they're entitled
10 to do that.

11 CHIEF JUSTICE ROBERTS: I know they are
12 entitled to it.

13 MR. SCHWARZ: Well, the --

14 CHIEF JUSTICE ROBERTS: As a practical
15 matter, is that a realistic option in New York?

16 MR. SCHWARZ: If you look at the amicus
17 briefs filed in our favor, the State bar, the City bar,
18 the Fund for the Modern Courts, the City of New York all
19 filed a brief in which they say, we think the right
20 solution is to have an appointive system, and they're
21 working to try to have that happen. And the governor
22 has put forward a bill for an appointive system. But,
23 they say --

24 CHIEF JUSTICE ROBERTS: Well, I'm sure he
25 has. I mean that's in his interest.

1 (Laughter.)

2 MR. SCHWARZ: No, not --

3 CHIEF JUSTICE ROBERTS: I thought I read a
4 representation somewhere in the briefs that it's
5 unrealistic to expect that New York would move to an
6 entirely appointive system. So that the options, if
7 you're successful, the options will either be direct
8 election of judges or a pure convention with no role for
9 the voters at all.

10 MR. SCHWARZ: No, it could be a role for the
11 voters that does not burden them in the way this statute
12 burdens them.

13 And the -- that brief by the State bar and
14 the Bar of the Association of the City of New York and
15 the other groups who are strongly in favor of an
16 appointive system, say to this Court, this is the worst
17 of all worlds. And it -- this system, as also the
18 amicus brief from the former judges who were responsible
19 for appellate judges responsible for administering the
20 New York State system, says that this system has
21 undermined judicial independence and undermined
22 confidence in the courts.

23 And that is -- you know -- that is clearly
24 correct --

25 JUSTICE GINSBURG: There's also one view, I

1 think it was, in the Feerick Report that said, the worst
2 thing in the world would be to return us to the primary
3 system this system was intended to replace.

4 MR. SCHWARZ: Yes, the -- actually the
5 Feerick report, which found that the party leaders all
6 over State however have always made the picks, they
7 voiced a favoring amending the law. They -- they think
8 the law needs to be amended.

9 And Chief Judge Kaye, in her remarks after
10 the decisions came down and after the Feerick Commission
11 report came out, said the problems that had been
12 revealed in this case are pervasive both systemically
13 and geographically.

14 The Feerick Commission's view is that,
15 unless there's public financing, in which case they'd
16 favor some more involvement by the voters, is simply
17 amend the portions of the law that make it so burdensome
18 on competitors, on voters.

19 We're -- we're neutral. We just say this
20 law is unconstitutional. And how it should be amended
21 is up to the Legislature, but that it should be amended
22 is -- there's a powerful case and, you know, I don't
23 know where I am on the time here, but I commend to you
24 the various amicus briefs that have come in on --

25 JUSTICE STEVENS: They're all policy

1 arguments about why this is a terrible statute. They're
2 not necessarily constitutional arguments.

3 MR. SCHWARZ: No, they also speak --

4 JUSTICE STEVENS: And that's a vast
5 difference.

6 MR. SCHWARZ: -- speak about the
7 Constitution, and, indeed, it's not very often that you
8 find, on a constitutional issue, both the Washington
9 Legal Foundation and the ACLU coming in, as they have
10 come in, to assert that this is an unconstitutional
11 statute.

12 CHIEF JUSTICE ROBERTS: Well, it's not often
13 you have both the Democratic Party and the Republican
14 Party --

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: -- supporting it
17 either.

18 MR. SCHWARZ: Yes, but then I -- I think you
19 should look at the -- what you've said in -- not you,
20 but your predecessor said in *Eu*, about we've never held
21 that a political party's consent will cure a statute
22 that otherwise is violative and, there are other quotes
23 in Justice Scalia's *Tashjian* opinion and in -- in
24 several other cases to that effect.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Schwarz.

2 MR. SCHWARZ: Thank you.

3 Mr. Olson, you have 4 minutes remaining.

4 REBUTTAL ARGUMENT OF THEODORE B. OLSON
5 ON BEHALF OF PETITIONERS NEW YORK STATE
6 BOARD OF ELECTIONS ET AL.

7 MR. OLSON: Thank you, Mr. Chief Justice.

8 The Second Circuit reinstated what the New
9 York Legislature found to be a bad system, that it
10 discouraged qualified candidates and it encouraged this
11 unfortunate, unseemly race for money.

12 The Respondents just said that that is not
13 what they were interested in doing, but their prayer for
14 their relief, on page 35 of their complaint, calls for a
15 direct primary election for the Supreme Court.

16 With respect to the Kusper case,
17 Justice Kennedy, I gave that a little bit more thought.
18 That -- that case focused on the fact that the statute
19 was inhibiting the rights of an individual who wanted to
20 participate in a way that the party wanted that
21 individual to participate. That long period of time
22 prevented both the individual and the association from
23 associating together, which is why --

24 JUSTICE KENNEDY: You say the State, your
25 mean the State statute?

1 MR. OLSON: Yes. But -- and to the extent
2 that it was -- it was -- part of that is answered by
3 your Clingman case which just came relatively recently,
4 where the party wanted independents to vote in the
5 primary and the Supreme Court -- this Court said that
6 the State had to let that happen. With respect to time
7 periods between when you had to identify yourself as a
8 party member this court held in the Rosario case that a
9 certain length of time is appropriate under the system.

10 With respect to Mr. Dunne, we've heard about
11 him. He may have had a desire to be a delegate but he
12 never tried to get the 500 signatures. It says that
13 right on his -- on page 19 of his brief -- the brief
14 that my colleague was quoting.

15 With respect to the questions that I think
16 both Justice Stevens and Justice Souter were asking,
17 could the State lodge the candidate selection or the
18 delegate selection process in the party leaders, I can't
19 conceive of how that would be unconstitutional.

20 If the parties wanted to select the
21 delegates or select the candidates to be their standard
22 bearers, that seems to me to be perfectly within the
23 right of an association to do; and would be perfectly
24 appropriate, provided that there was an access for
25 independents and --

1 JUSTICE SCALIA: You're not saying the State
2 could compel that?

3 MR. OLSON: No. No.

4 JUSTICE SCALIA: You're saying that the
5 State could permit it?

6 MR. OLSON: No. But I think those
7 hypothetical questions are could the State vest that
8 authority.

9 Finally I think it's important to say -- oh,
10 one more preliminary point. It is competitive in New
11 York. It may not be perfectly competitive, as is the
12 case of 90 percent of the congressional districts in
13 this country, which are said not to be competitive. But
14 in New York, six sitting judges testified in -- in -- in
15 the lower court that they successfully lobbied delegates
16 to, you know, to be candidates. So that happens.

17 Between 1900 and 2002, this is appendix 130,
18 nearly one fourth of the general elections in New York
19 were competitive.

20 Lopez Torres, the Respondent, received 25
21 votes at the 2002 judicial selection convention, and
22 many of the districts in New York are not dominated by a
23 single party.

24 So the final point is it is important to
25 emphasize this is a -- a challenge on its face to the

1 statute that simply creates a delegate election and it
2 then creates a convention. Neither of those provisions
3 can possibly be constitutional, and so what the
4 Respondents are complaining about is what party bosses
5 do.

6 But on page 38 of their brief, they state
7 categorically that the constitutional offense is not the
8 fact that party leaders act as one would expect in
9 choosing nominees.

10 In other words, they act -- party leaders act like party
11 leaders and exercise their influence. They're not
12 saying that that's unconstitutional. What they're
13 saying is that a statute that allows party leaders to be
14 party leaders, to be constitutional, to act in ways
15 which are not only permissible under the Constitution as
16 they knowledge, but constitutionally protected, is
17 somehow constitutional. That simply is not consistent
18 with any of this Court's jurisprudence, which says that
19 political parties must have the maximum opportunity to
20 select their leadership.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you Mr. Olson.

23 The case is submitted.

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

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