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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL CLINGMAN, SECRETARY, :
OKLAHOMA STATE ELECTION :
BOARD, ET AL., :
Petitioners :

v. : No. 04-37

ANDREA L. BEAVER, ET AL. :

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Washington, D.C.
Wednesday, January 19, 2005

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

APPEARANCES:

WELLON B. POE, JR., ESQ., Assistant Attorney General,
Oklahoma City, Oklahoma; on behalf of the
Petitioners.

GENE C. SCHAERR, ESQ., Washington, D.C.; on behalf of
South Dakota, et al., as amici curiae, supporting
the Petitioners.

JAMES C. LINGER, ESQ., Tulsa, Oklahoma; on behalf of
the Respondents.

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3 JUSTICE STEVENS: We'll now hear argument in
4 Clingman against Beaver.

5 Mr. Poe, as soon as you're ready, we'll hear
6 from you.

7 ORAL ARGUMENT OF WELLON B. POE, JR.

8 ON BEHALF OF THE PETITIONERS

9 MR. POE: Mr. Justice Stevens, and may it please
10 the Court:

11 This case today involves a conflict between
12 Oklahoma's semi-closed primary law and a rule adopted by
13 the Libertarian Party of Oklahoma which, contrary to that
14 State law, would allow the Libertarian Party to open its
15 primary elections not just to independent voters, but also
16 voters registered as members of other political parties.

17 The Oklahoma primary system simply requires that
18 a person who is registered as a member of that party may
19 only vote in that political party's primaries. If the
20 voter desires to vote in another party's primary, all that
21 voter must do is, within a reasonable time before the
22 elections, primary elections, approximately 7 to 8 weeks,
23 is disaffiliate from that first party and then reaffiliate
24 as a member of that second party, or if the parties so
25 chose to allow independents, he may registered as an

1 independent in order to vote in that primary.

2 JUSTICE O'CONNOR: Well, of course, I guess from
3 the standpoint of the Libertarian Party, it's kind of a
4 problem because a voter who wants to disaffiliate under
5 Oklahoma law with their -- their prior registration have
6 to do it basically 8 weeks ahead, at which time they don't
7 know if the Libertarian Party will even qualify for having
8 a primary. I mean, it just gives them a very impossibly
9 short window. If the time were reasonable, that might be
10 a different picture, but isn't that kind of burdensome?

11 MR. POE: Well, Your Honor, the practicality of
12 that matter is -- is that generally the parties are
13 notified 10 days/2 weeks in advance of the registration
14 deadline that they are being -- if -- being recognized as
15 a political party. Of course -- and that's if that party
16 has waited until the very last minute by statute in which
17 to turn in their petitions and try to get recognized. Of
18 course, those petitions could be turned in earlier, which
19 would allow them more time to do so. But the practicality
20 of the -- of --

21 JUSTICE SCALIA: If they're turned in earlier,
22 will they -- will they be ruled on earlier?

23 MR. POE: Yes, Your Honor. The Oklahoma statute
24 requires that the election board take a -- has 30 days, a
25 maximum of 30 days, in which to review the petitions,

1 verify the number of signatures and the authenticity of
2 those signatures, and then make a decision on whether to
3 recognize or not recognize the political party.

4 JUSTICE BREYER: I guess there's a difference
5 here between the interest of a small party and a large
6 one. A small party would like, if there is a deadline, to
7 be as close to the election as possible so voters have a
8 chance to get fed up with the two big parties.

9 (Laughter.)

10 JUSTICE BREYER: That's their chance. A big
11 party would like it to be further away because then they
12 can plan how their election campaign is going to be.

13 Has any of this been litigated below?

14 MR. POE: No, Your Honor. The -- the only
15 question that has really been litigated below is whether
16 section 1-104, which is the semi-closed primary law, is
17 burdensome on the association rights of the Libertarians.

18 JUSTICE KENNEDY: In line -- in line with
19 Justice Breyer's question, does the State of Oklahoma have
20 an interest in insulating major parties from competition
21 for members?

22 MR. POE: Not from insulating them from
23 competition, Your Honor, but the State of Oklahoma does
24 have -- it has a closed primary system. It has -- it has
25 an interest. And this Court has found that interest, as

1 recently as in Timmons, that it does have an interest in a
2 stable political system, which may be a two-party system.
3 As long as --

4 JUSTICE KENNEDY: So you have a -- the State has
5 an interest in protecting major parties from losing their
6 members and thereby weakening the two-party system by
7 benefiting a third party. I thought that's contrary to
8 the whole thrust of our holding in cases such as Anderson
9 and Celebreeze where third parties are entitled to special
10 protection under the First Amendment.

11 MR. POE: Well, Your Honor, since that time in
12 Anderson and as Timmons and other cases cite, if the
13 regulation is a neutral, nondiscriminatory regulation,
14 then it is a proper regulation as far as it is applied to
15 all the parties.

16 In regards to the requirement of registration,
17 change of voter registration, all of those are applied
18 equally across any -- any party, whether it be the
19 Libertarian Party, the Democratic Party, Republican Party,
20 or any other party which may be recognized at that time in
21 the State of Oklahoma.

22 And back to Justice Breyer's comments, the
23 period of 7 to 8 weeks prior to a voting -- to a primary
24 election is actually a very short time as compared, for
25 example, to Rosario which this Court --

1 JUSTICE KENNEDY: Well, even in presidential
2 elections, most people don't get interested until 4 or 5
3 weeks before the election. Everybody knows that.

4 MR. POE: Well, Your Honor, we -- this is not
5 the presidential primaries of which we're talking about.

6 JUSTICE KENNEDY: Well, I'm saying even in a
7 presidential primary. If they're local races, it -- it
8 takes longer. The public just tunes out until the last --
9 last couple weeks.

10 MR. POE: Well, the statutes in this -- or the
11 sites or the -- the elections themselves are close in
12 time, and -- and the statutes involving the petitioning
13 have all been looked at as -- as courts and have been
14 found that this is a close enough connection to the time
15 of the elections, that that time frame of petitioning and
16 getting the requirements for -- for petitions and the
17 State recognizing the political party all fit comfortably
18 within the confines of -- of constitutionality.

19 JUSTICE GINSBURG: Mr. Poe, the -- the district
20 court in this case rejected all grounds except one. It
21 rejected the raiding and swamping. It said that's what
22 the Libertarians want to expose themselves to. It's not
23 for a State to be paternalistic to protect them against
24 their own bad choices. But it said this request is
25 damaging to the majority parties, to the major parties,

1 because it poaches on their members. But there is not in
2 this litigation any major party that's complaining about
3 that. So if that is the rationale that the district court
4 went on, can this Court possibly uphold it when there is
5 nobody, as far as we know -- they haven't even come into
6 this case at this level, filing a friend of the Court
7 brief.

8 MR. POE: Yes, Your Honor. This Court can find
9 -- first of all, that the local Democratic and Republican
10 Parties were not named in -- in the action, and as to why
11 they were not in the action in lower courts I do not know.
12 But the State has its interests and has to protect those
13 interests whether those parties are involved in litigation
14 or not.

15 JUSTICE GINSBURG: Well, when you -- would you
16 say that the rationale on which the district court
17 rejected the Libertarian Party's claim was unsatisfactory?

18 MR. POE: No, Your Honor. Under Monroe before
19 this Court, I think the Court was looking to the
20 potential, the possibility, of course. And as to the fact
21 pattern we had at the trial court, it was a very minor
22 party wanting to -- or effectively poach voters from the
23 two major parties.

24 But you have to look at the entire statutory
25 scheme and not just how it would apply. It could be

1 applied by the Democrats or the Republicans.

2 But also more importantly, in Monroe this Court
3 clearly stated that a State does not have to wait until it
4 sees actual damage to its political or electoral system to
5 make reasonable decisions. In fact, this Court says the
6 States should have the foresight to make those reasonable
7 determinations in an effort to prevent those -- those
8 potential evils from occurring if the likelihood of -- of
9 that is there.

10 And the district court made very --

11 JUSTICE SCALIA: Mr. Poe, I -- I -- here I am.

12 MR. POE: Excuse me, Justice Scalia.

13 JUSTICE SCALIA: I suppose that if -- if I were
14 the party chairman of the Republican or Democratic Party,
15 I'm -- I might have defended your -- your State system if
16 I had been named as a party, but if I were not named as a
17 party, I'm not sure that I wouldn't -- I wouldn't decline
18 to come in as an amicus, even though I'm interested in the
19 outcome simply because I don't want to alienate my
20 Republican members by depriving them of the freedom, if
21 they want to do it, to go vote. You know, it makes you
22 look sort of parsimonious, doesn't it, when you tell your
23 Republican members, I don't want you to vote in the
24 Libertarian primaries? I -- I don't think we can say that
25 it doesn't hurt the Republican Party or the -- or the

1 Democratic Party simply because they hadn't filed an
2 amicus brief.

3 MR. POE: I would agree, Your Honor. I -- I
4 think the -- the fact that they're not there -- here the
5 Court --

6 JUSTICE SCALIA: They are, after all,
7 politicians, aren't they?

8 (Laughter.)

9 MR. POE: And they do like to keep their party
10 members as happy as they can.

11 JUSTICE STEVENS: Mr. Poe, may I just focus in
12 on exactly what the injury is? Is the injury that they
13 vote with the Libertarians or that they don't vote with
14 their own party?

15 MR. POE: The -- the injury is twofold, Your
16 Honor. And -- and first, it is the fact that by them not
17 voting in the primary to which they have associated -- and
18 that is registering as a Republican or a Democrat -- if
19 they go to the polling place and at the last minute decide
20 to go and vote in the Libertarian Party primary, their
21 decision not to vote in the Republican primaries, when
22 candidates have been trying to -- to use voter lists
23 trying to get to their party members to vote --

24 JUSTICE STEVENS: But wouldn't it be precisely
25 the same injury if they just didn't like the Republican

1 candidate in that particular election, decided to stay
2 home?

3 MR. POE: Well, if they had already made the
4 decision to stay home, then they would not be voting for
5 the candidate, but they would also not be voting in
6 another party's primary.

7 JUSTICE STEVENS: How -- how are they hurt by
8 the fact that rather than staying home, they decide to
9 cast a vote for a minority party candidate?

10 MR. POE: Well, the party is here because it has
11 the -- the possibility, for those who are not voting, of
12 changing the elections of the candidates. And I think
13 also by --

14 JUSTICE STEVENS: Well, it's very unlikely if
15 it's a party that is -- gets the small vote that this
16 party gets. But you -- no matter how small the vote is,
17 you still find the injury to the major parties because
18 they voted for the Libertarians or because they didn't
19 vote at all?

20 MR. POE: Well, because they voted either way of
21 voting -- or for voting in the Libertarians and -- and not
22 voting, they have changed and possibly have changed,
23 especially when they went to the --

24 JUSTICE STEVENS: Is there any evidence on the
25 question whether the -- the support for the major party

1 candidate is any smaller than it would have been if there
2 had been no Libertarian Party at all?

3 MR. POE: There -- there's nothing in the record
4 that supports any of that.

5 JUSTICE SOUTER: And -- and a very similar
6 question. Is there anything in the record that indicates
7 that those who would vote in the Libertarian primary are
8 the stay-at-home Republicans or the Republicans who would
9 otherwise have voted in the Republican primary?

10 MR. POE: There -- there is nothing in the
11 record. There was no type of polling. There was some --
12 some expert testimony as to the potential reasons for
13 people voting in a Libertarian primary such as purposeful
14 intent to do harm to Libertarians or walking in intending
15 to vote --

16 JUSTICE SOUTER: But that -- I mean, the
17 Libertarians are happy to have -- take that risk.

18 MR. POE: Yes.

19 JUSTICE SOUTER: It seems to me if we don't know
20 whether the -- the Republicans who are going to migrate to
21 the primary are stay-at-homes or Republican voters, the
22 State has no basis even to say whether in fact the harm
23 it's trying to prevent is going to be affected one way or
24 the other by its rule.

25 MR. POE: Well, I -- I think, Your Honor, there

1 -- there is a context or -- there is belief that it will
2 harm. And there's been no polling in this action, and
3 there's no -- there was only one other State that has a
4 open -- what we have termed in this litigation as a -- a
5 semi-open primary. And there's no data that has
6 effectively come out of their one primary that says why
7 people are not voting, why they're voting in one primary
8 or not or the effects of that. I can give you --

9 JUSTICE SCALIA: Mr. Poe, I -- I -- why do you
10 rely only upon the damage to the Republican and Democratic
11 Parties? I frankly don't care much about that, but I
12 might care a whole lot about damage to -- to Oklahoma's
13 system of election.

14 Why do you allow party designations? I suppose
15 it is because you want people to know that there are
16 candidates who are associated with particular political
17 views. And to allow a party to, in effect, come in and
18 say, we don't have any particular political views, we --
19 we just want to nominate, you know, whoever the most
20 people want to nominate, that just destroys the whole
21 purpose of -- of your system of allowing people to run
22 under a party label. What's the use of a party label?

23 MR. POE: And -- and, Your Honor, we -- we
24 provided that information and those interests to -- to the
25 district court. And those are interests the State has.

1 It is if a party is running as a party and if the State --
2 there -- there may be an interest in it. I'm not sure --

3 JUSTICE SCALIA: It -- if it's running as a
4 party, it should run somebody who -- who shares the views
5 of the people in that party, which is somebody who is
6 nominated by -- by the people in that party, or at least
7 those people, joined by others who are not affiliated with
8 another party. That seems to me to make a lot of sense.

9 And it seems to me to destroy that system if --
10 if you say, hey, we're -- you know, we -- we're going to
11 allow the Libertarian Party to say, you know, we don't
12 have any real views. We're just going to -- we want to
13 nominate somebody that most people like. So let the
14 Republicans come in, the Democrats come in. The only
15 thing we want is to win. We don't really care.

16 MR. POE: That -- that is the premise, of
17 course, of the voter registration.

18 And -- and that goes back to another -- an
19 adverse effect on the State and the State's political
20 system is this Court has recognized -- it recognized it as
21 recently as Jones and it has recognized in other cases --
22 that there is a -- a party labeling or a party
23 identification that voters use in a general election. And
24 if the poaching of members have changed the -- any of
25 those party -- those messages from that party, then the

1 reliance is going to be misplaced by those party members
2 when they go. They go to vote for a Democrat. They see
3 the D or the R or the L.

4 And more importantly, in this case we're not
5 talking just about the Libertarian Party, the effect of
6 the Libertarian Party. It could very well the effects on
7 all of the political parties. In fact, that effect could
8 happen if the Democrats wanted to open theirs up and run
9 that effect on the Libertarian Party.

10 Another reason, especially that is specific to
11 Oklahoma, to help prevent party factionalism and party
12 splintering. In Oklahoma, when a new party is recognized,
13 a -- a potential candidate has the opportunity within 15
14 days of the party being recognized of changing his voter
15 registration. That can even be outside the parameters of
16 section 4-119.

17 In that instance, there is the potential and I
18 think the probability of this occurring is that -- let's
19 say there are four or five candidates who have announced
20 for the Republican nomination if they want to get their
21 nomination, and one of them decides I don't want to
22 compete against those others. A new party comes in. He
23 is excused from the 6-month disaffiliation requirement.
24 Within those 15 days, he can change to the Libertarian
25 Party in hopes of getting that nomination, get the party

1 support and the party structure. By that happening, you
2 then incur -- by allowing this party-option primary, you
3 then -- that would promote party splintering, party
4 factionalism. And the manner of that individual going to
5 the Libertarian Party the day of the election without any
6 prior registration -- those Republicans who may have
7 supported him leave the Republican Party and start to
8 choose that. That's splintering that this Court has
9 specifically said is not only a legitimate, important
10 State interest but is also a compelling State interest to
11 effect.

12 Poaching has the same effect as raiding. It is
13 a little different how it gets there, but it has the same
14 effect. And raiding has been determined to be even a
15 compelling State interest in this Court.

16 I would like to reserve the rest of my time.

17 JUSTICE STEVENS: That's fine.

18 Mr. Schaerr.

19 ORAL ARGUMENT OF GENE C. SCHAERR

20 ON BEHALF OF SOUTH DAKOTA, ET AL.,

21 AS AMICI CURIAE, SUPPORTING THE PETITIONERS

22 MR. SCHAERR: Justice Stevens, and may it please
23 the Court:

24 In the decision below, the Tenth Circuit stuck
25 -- struck down an election rule that has been adopted by

1 nearly half the States pursuant to their authority under
2 Article I, section 4 to prescribe the manner of holding
3 elections. In so doing, the Tenth Circuit in our view
4 made three fundamental errors that I'd like to address
5 briefly.

6 The first was the Tenth Circuit's per se
7 approach to determining whether the alleged burdens here
8 are severe. That's an extremely important issue, of
9 course, because to our knowledge, this Court has never
10 invalidated a State election regulation under the First
11 Amendment without first finding that the burden at issue
12 was severe. But instead of looking at that issue closely,
13 the Tenth Circuit, at page 15 of its decision, simply
14 assumed that a severe burden necessarily arises from any
15 regulation that, quote, restricts the options of parties
16 seeking to define the scope of their associational rights.

17 Now, one would have thought that it's for courts
18 to determine the scope of a -- of a party's associational
19 rights rather than -- than the party itself. But in all
20 events, that was the sum total of the Tenth Circuit's
21 analysis on the -- on the question of severe burden.

22 Now, the respondents cite that finding, but they
23 -- they make no attempt to defend that approach. They
24 argue instead that the burden here is severe because, at
25 bottom, Oklahoma requires a Republican or Democrat,

1 wishing to vote in the LPO primary, to -- to disaffiliate
2 from the party 2 months in advance. But that burden is no
3 more severe than others that this Court has found
4 constitutionally acceptable.

5 The burden on voters, for example, is less
6 severe than the burden this found -- this Court found
7 acceptable in Rosario, which was a -- a requirement, as
8 Mr. Poe mentioned, that voters, wishing to vote in a -- in
9 a party's primary, register as a member of that party some
10 8 to 11 months in advance.

11 The burden on the party is also less severe than
12 a burden that this Court found acceptable in Burdick which
13 is that a party wishing to qualify for a primary ballot
14 gather the necessary signatures, in that case 1 percent of
15 the voting population, 5 months before the primary. It's
16 2 months here.

17 And it's also similar to a burden that all the
18 members of this Court found acceptable in Burdick, which
19 was -- which was a requirement that a candidate wishing to
20 run on a nonpartisan primary ballot collect the necessary
21 signatures about 2 months before the primary.

22 And the message of these decisions -- and I
23 think it's fair to say the holding in Burdick -- is that
24 requiring participants in elections to take action a few
25 months sooner or a few weeks sooner than they might prefer

1 does not amount to a severe burden. And that's the only
2 real burden here. The LPO has to --

3 JUSTICE O'CONNOR: Well, I guess the one other
4 concern would be the timing in Oklahoma is such that the
5 -- the Republican or Democrat who wants to disaffiliate in
6 order to vote with the Libertarians has to do so at a time
7 before the State has decided whether to allow the
8 Libertarian Party on the ballot. So, you know, it
9 probably isn't burdensome to -- in principle, to have some
10 disaffiliation requirement, but does the State have to
11 allow enough time so that the decision can be made with
12 knowledge of whether the Libertarians are going to be on
13 the ballot?

14 MR. SCHAERR: Justice O'Connor, I -- I think
15 that's really up to the party. And I -- and I think that
16 gets back to my point about Burdick. Yes, there is a
17 deadline and if the LPO --

18 JUSTICE O'CONNOR: It just seemed to me that it
19 might be more burdensome on the voter in that situation.

20 MR. SCHAERR: Yes, I -- I think that's true, but
21 again, the burden on the voter depends on what the LPO
22 does. If the LPO marshals its resources, gets -- gets its
23 message out, determines who its candidates are going to be
24 or who its potential candidates are going to be in advance
25 of the filing deadline and in advance of the deadline for

1 filing a petition to become a recognized party, then the
2 voter will have ample time to make a decision. It's
3 really only if the LPO procrastinates that the voter is
4 put in that position. It's not really a function of the
5 -- of the State law.

6 JUSTICE SOUTER: Let me just ask you to look at
7 the other side of the equation. However we assess the
8 burden, we're assessing it in relation to the State's
9 interest. What is your best statement of the State's
10 interest here that you think is defensible?

11 MR. SCHAERR: Well, I think -- I think the
12 State's interest is what the district court found it to
13 be, and I think the -- the district court actually found
14 two interests, not just one. It found an interest in
15 avoiding poaching and an interest in promoting party
16 loyalty along the lines that Justice Scalia mentioned
17 earlier.

18 JUSTICE SOUTER: Do -- do you think the -- the
19 poaching argument stands up on any -- any empirical basis?

20 MR. SCHAERR: I do. And in fact, the -- the
21 district court at -- at page 49 --

22 JUSTICE SOUTER: May -- let me just add quickly.
23 I -- I realize, of course, there's going to be some
24 movement of voters, but do we have any idea whether the
25 voters who are moving are the ones who would otherwise

1 have stayed at home anyway and done nothing, merely
2 nominal Republicans as opposed to active Republicans?

3 MR. SCHAERR: Yes. We -- we do have answer to
4 that. That is implicit, first of all, in the district
5 court's finding that poaching would, in fact, made -- make
6 a difference in the -- in the outcomes of the elections.
7 He -- he made that finding very clearly on -- on page
8 49 --

9 JUSTICE SOUTER: Well, he found that the numbers
10 are such that they could, but did he find -- and I'm not
11 sure of this. Did he find that the actual people who
12 migrated would otherwise have voted differently so that in
13 fact it made a difference?

14 MR. SCHAERR: That is implicit in his finding.
15 He said the institution -- this is again on page 49. The
16 institution of a party-option open primary format in
17 Oklahoma, as sought by the plaintiffs, would likely affect
18 the outcome of some primary elections. That -- implicit
19 in that is the view that there -- there would be some
20 voting Republicans and voting Democrats that would be
21 moving to the LPO, not just the nonvoting Democrats and
22 Republicans.

23 Now --

24 JUSTICE GINSBURG: Was there a basis in the
25 record for making that finding?

1 MR. SCHAERR: Yes. Mr. Darcy's testimony, which
2 I believe appears at -- at page 63 of the joint appendix,
3 in that -- in that general area, anyway.

4 Now, poaching -- poaching is a concern and --
5 and a legitimate and important concern to the States for
6 three important reasons. I -- I might mention that in
7 Tashjian this Court mentioned in footnote 13 that a --
8 that an open primary could have disorganization effects on
9 the other parties, and poaching is one of those, as the
10 district court found. And -- and it's a concern for three
11 independent reasons.

12 First of all, the State has an interest in
13 preventing poaching because that helps protect parties
14 from spurned candidate candidacies which was one of the --
15 the Court in Tashjian identified Storer and Rosario as
16 examples of that. And -- and the -- the semi-closed
17 primary protects parties against that. For example, if a
18 candidate for the Democratic nomination felt that she
19 wasn't getting enough support from the party leadership
20 before the primary, she might form or join another party
21 and then try to take -- take her supporters with her into
22 that other party. And although Oklahoma allows the
23 candidate to switch parties in that circumstance, the --
24 the semi-closed primary and the 7-week period or 7- or 8-
25 week period, standoff period, if you will -- that period

1 protects the party from having its voters poached as a
2 result of a -- of a spurned candidate joining another
3 party.

4 The second reason that poaching is a significant
5 concern is that -- is that it can lead to efforts,
6 strategic efforts by -- by other parties to influence the
7 outcome of another party's primary. For example, suppose
8 we're in California in 2002 a few days before the
9 gubernatorial primaries there. The Democrats have already
10 decided that their incumbent, Governor Davis, will be
11 nominated, so they're looking ahead to the general
12 election. And they see two possible Republican
13 candidates, Reardon and Simon, to pull two names out of a
14 hat. And they conclude that -- that they have a better
15 chance of beating Simon than they have of beating Reardon.
16 Well, what can they do to affect the -- the outcome of the
17 Republican race?

18 One possibility, if the Republican primary is
19 open, is to raid it by having some Democrat switch
20 registration and go vote for Simon. And of course, the
21 Court has said repeatedly that States have an important
22 interest in -- in preventing that kind of behavior.

23 The other possibility is for the --

24 JUSTICE STEVENS: And that's not permitted in
25 Oklahoma, is it? That kind of behavior is not permitted

1 in Oklahoma.

2 MR. SCHAERR: That's correct.

3 JUSTICE STEVENS: Yes.

4 MR. SCHAERR: That's correct.

5 And the other possibility, though, is for the
6 Democrats to open their primary and to lure some of the --
7 some of the Reardon voters out of the Republican primary
8 through targeted advertising or direct appeals from the
9 candidate or something like that.

10 JUSTICE STEVENS: Well, neither of the major
11 parties has done that in Oklahoma, has it?

12 MR. SCHAERR: Not that I'm aware of, but -- but
13 it is -- but it is a plausible concern that a legislature
14 would have. And as Justice Scalia said, these --

15 JUSTICE STEVENS: But the question is whether
16 when a minor party like the Libertarians do it, is -- is
17 it going to have that effect.

18 MR. SCHAERR: Well, there -- there's another
19 scenario for -- in the California example, for example.
20 Take -- assume that the Democrats, instead of opening up
21 their own primary to Republicans, they strike a deal with
22 the Green Party such that the Green Party makes an effort
23 to peel off the Reardon voters out of the Republican
24 primary voting pool in California. That --

25 JUSTICE STEVENS: But the cost of that deal

1 would -- they'd also run the risk the Democrats would --
2 would migrate also if they made that deal.

3 MR. SCHAERR: It depends on how they ran -- ran
4 the campaign.

5 In all events, it's a -- it's a plausible
6 scenario and -- and one that the State is entitled to
7 respond to before it -- before it actually happens.

8 Now, the -- the third reason that poaching is a
9 problem is that --

10 JUSTICE STEVENS: I apologize for taking your
11 time with a question, but I'm afraid your time is up.

12 MR. SCHAERR: Thank you.

13 JUSTICE STEVENS: Yes.

14 Mr. Linger.

15 ORAL ARGUMENT OF JAMES C. LINGER

16 ON BEHALF OF THE RESPONDENTS

17 MR. LINGER: Justice Stevens, may it please the
18 Court:

19 The integrity of a political party should be
20 defined by the political party and not by the State.

21 The State interest that they have asserted here
22 and alleged is to prevent against draining, and draining
23 the State has defined as the inverse of raiding. Now,
24 raiding, of course, is the State preventing and keeping
25 out of a political party disloyal voters of another party

1 coming in for a purpose to hurt that party. Now, if
2 draining is inverse raiding, then the State is saying that
3 it has an interest in keeping in to a political party
4 disloyal voters. So the State is asserting and is at
5 cross purposes that it has an interest to both keep out
6 disloyal voters from a political party's primary and at
7 the same time keep in disloyal voters.

8 JUSTICE BREYER: Why is that inconsistent?
9 Because I mean, you're -- you're basically advocating that
10 the Constitution requires Alaska's rule, and I thought
11 that -- we got briefs on that, I think, in -- in the
12 previous case and a lot of other parties thought Alaska's
13 rule was not a wise rule, though that's up to Alaska. But
14 to think that the Constitution requires that is
15 surprising.

16 The interest they assert is just the one you
17 said --

18 MR. LINGER: And --

19 JUSTICE BREYER: -- that the Republicans, in
20 order to have their party work, have to be able to plan a
21 campaign for a stable group of voters. They have to know,
22 roughly, who is in their party, let's say, a week before
23 or 2 weeks before, some period of time before. And that's
24 the interest that Oklahoma is asserting. It has nothing
25 to do with you. It has do with -- and it has zero to do

1 with you if you had a rule for minor parties, frankly.
2 But if you can't get a rule for minor parties, special,
3 then you have to take it seriously I think.

4 MR. LINGER: Most States --

5 JUSTICE BREYER: What's your answer? What do
6 you respond --

7 MR. LINGER: Justice Breyer, most States have a
8 rule for minor parties. They don't treat, like Oklahoma
9 does, you're either a party or you're a nothing.

10 JUSTICE BREYER: The States do but to say that
11 the Constitution -- and I'm asking. You see, I'm not --
12 but I -- if I could figure out how in the Constitution you
13 had a special rule for minor parties, the interest that
14 they're asserting has very little to do with it. But I
15 don't see how you can have a constitutional rule that
16 would forbid -- allow you to open and drain, but wouldn't
17 allow the Dems to do the same as they've done in Alaska.

18 MR. LINGER: I think in -- in Alaska, of course,
19 right now there is a party option where all the parties
20 but the Republicans have opened the primary. They have a
21 blanket primary. The Republicans haven't and the
22 Republicans, of course, in Alaska happen to be the
23 dominant party. There seems to be a pattern in these
24 cases --

25 JUSTICE BREYER: Well, because they say -- what

1 they're thinking, I take it -- I don't know what they're
2 really thinking, but I imagine they could be thinking, no,
3 we don't want to open our primary. We'll run the risk
4 that our voters go over and vote for the Dems and like it
5 there and stay. We'll run that risk, but we don't want
6 them coming and raiding us. We think that's the bigger
7 risk.

8 MR. LINGER: And -- and that --

9 JUSTICE BREYER: And how can the Constitution
10 tell them that they can't make that judgment? That's
11 what's bothering me.

12 MR. LINGER: I don't think the -- I think the
13 Constitution -- and the Court has recognized that it is
14 legitimate to protect against raiding because we can all
15 suppose how disloyal voters coming into a party could hurt
16 it. But how about disloyal voters leaving a party?
17 Because these voters that would come in and vote in the
18 Libertarian --

19 JUSTICE BREYER: Go back to my interest, the one
20 I asserted --

21 MR. LINGER: Yes.

22 JUSTICE BREYER: -- which isn't that. It is the
23 interest in the Republican Party in Alaska saying to
24 itself we do not want our voters to go leave and vote for
25 the Democrats because we want a stable body of people 3 or

1 4 weeks before the election for whom we can plan. We
2 don't want to open ours because we don't want the raiding.
3 We want to keep --

4 MR. LINGER: And, Justice Breyer, that sort of
5 First Amendment view of your voters shows that the party
6 thinks that they own the voters. We hear this language
7 where the party is contributing voters or they're being
8 poached or it's a donor party. That shows a certain view
9 of the party and what they --

10 JUSTICE BREYER: No, no. It's not an ownership,
11 but you have a period of time. So you focus on the period
12 of time. They're saying, of course, up to X period of
13 time, they take their choice. Is this a fake thing, a
14 fake reason, the need to have a stable group of people for
15 whom you plan your campaigns? Now, is that a hoax or is
16 it flimsy or is it serious? What do you think?

17 MR. LINGER: I -- I think it is flimsy and I'll
18 tell you why because I think paternalistically the State
19 of Oklahoma is way off or the Republican Party, if they
20 thought that way in Alaska, would be off. If you really
21 think about it, a party, particularly at the general
22 election, wants its loyal voters to get to the poll.
23 Actually this would be a benefit to the Republican and
24 Democratic Parties in Oklahoma or the Republican Party in
25 Alaska because it allow them to find out which of their

1 voters had voted in their primary and which had defected
2 to another party. When they're sending out mailers or
3 doing phone banks or driving people to the polls, they're
4 going to want to take their loyal voters. So this will
5 actually serve to help them to identify some of their
6 voters who aren't loyal, and they won't want to bring them
7 in. So I'm saying that --

8 JUSTICE SCALIA: The -- the State -- the State
9 of Oklahoma doesn't want your party raided. And -- and
10 you say we don't care if we're raided. Come raid us. All
11 we want to do is win. It seems to me it -- it -- you
12 cannot apply the -- the maxim, *volenti non fit injuria*.

13 Oklahoma is saying to your party, you can't
14 welcome raiding. We don't want your party to be raided
15 whether you like it or not because that's what a party
16 system is. We've set up these elections that -- that have
17 party primaries and party systems on the assumption that
18 each party is going to have a certain -- a certain belief,
19 a certain philosophy, and to allow your candidate to be
20 elected by everybody simply destroys that system. Why is
21 that -- why is that so unreasonable that it's
22 unconstitutional?

23 MR. LINGER: Because it's -- it's not practical
24 on what happens. As Justice O'Connor pointed out in her
25 questions, there is such a limited time. The

1 Libertarians, as shown in the record in this case, have
2 never and continually do not have the time to build up a
3 voter pool. They have their supporters spread out among a
4 number of political affiliations because there's such a
5 little amount of time that you can register as a
6 Libertarian, unlike the vast majority of States.

7 I don't think anyone has ever accused the
8 Libertarian Party of not having a set philosophy on what
9 they stand for.

10 But the fact of the matter, this Court itself
11 has expressed skepticism about whether even party raiding
12 ever exists. People don't go out generally to vote
13 because they want to pick someone who's a bad candidate.
14 They want to vote for someone they feel proud of who
15 expresses their views. The people that the Libertarians
16 would appeal to would be Republicans and Democrats who
17 either weren't going to vote in their primary or those who
18 were very Libertarian oriented or people who would be
19 Libertarians if they had more opportunity under the law to
20 register as Libertarians. They're, in effect, marooned --

21 JUSTICE SCALIA: Weren't those --

22 MR. LINGER: -- over these other affiliations.

23 JUSTICE SCALIA: -- weren't those who would like
24 to nominate the Libertarian candidate who would attract
25 the most people from the other large party? Right?

1 MR. LINGER: Who would they attract? They would
2 attract Libertarian-oriented people who would be drawn by
3 their philosophy because the Libertarian Party, as with
4 most minor parties, is an ideological party. They take
5 positions oftentimes ignored by the major parties, and
6 that is one of the reasons that --

7 JUSTICE SCALIA: No, but -- but the candidate
8 mostly to attract people from one of the major parties is
9 the candidate that is -- is more likely to water down the
10 pure Libertarian message and be closer to the message of
11 the Democratic Party or the Republican Party. And --
12 and --

13 MR. LINGER: If you can tell --

14 JUSTICE SCALIA: -- people who come into your
15 primary may want to elect such a candidate so that the
16 Libertarian Party will be strengthened and draw votes away
17 from the other majority --

18 MR. LINGER: Of course, this Court, I think, has
19 recognized that raiding is not a legitimate concern for
20 the State that overcomes a party that would open up. And
21 that's what the district court so held. We go into the
22 inverse of draining and talk about the effect it would
23 have on the Republicans and Democratic Parties. I think
24 the -- the district court said several times in its
25 opinion that the results would be highly speculative. But

1 I say that the results would probably be to the benefit
2 because it would ensure major parties that they got a
3 nominee who was picked by loyal supporters of the party,
4 and what would be drained off would be disloyal supporters
5 who would rather be doing something else.

6 And that, of course, is the essence of
7 competition. We should not be worrying about protecting
8 the major parties from competition for ideals. This is --

9 JUSTICE GINSBURG: Do I understand your brief to
10 say that this constitutional rule that you are seeking
11 would be just for the minority party? I think you said in
12 your brief it doesn't follow like the night the day that
13 because the Libertarians must be allowed to do this by the
14 Constitution, therefore the Democrats and Republicans must
15 also have the option to invite anyone into their
16 primaries.

17 MR. LINGER: The finding of the Tenth Circuit
18 was, of course, that it applied to these plaintiffs under
19 these particular facts. And I think that's one thing to
20 remember, how cautious and conservative this Court and the
21 First Circuit in Cool Moose were. They didn't make a
22 broad-based rule, and I don't interpret this decision and
23 I don't interpret the teaching of this Court in footnote
24 13 in Tashjian is that we should come down and make some
25 bright line rule that's always going to say we have to

1 have a party-option open primary or not. We need to look
2 at the factors. I think there are very few States that
3 this would even apply to because, as we know, 21 States
4 don't even have political primary registration.

5 JUSTICE SCALIA: What facts? We -- we have to
6 evaluate it on the basis of each election? What is a
7 State legislator supposed to do when he votes for a -- an
8 election system? He's going to flip a coin trying to
9 figure out what the fact situation will be when this --
10 when this system finally gets before a court? Surely that
11 -- that can't be the test.

12 MR. LINGER: I do -- I do ask that the State
13 legislatures think about what they're doing. And as I
14 demonstrated --

15 JUSTICE SOUTER: Okay. But you -- you want them
16 to think and you want to leave the door open to their
17 making a distinction for these purposes between the major
18 parties and the minor parties, and I can't think of
19 anything more intrusive into the political process than
20 that. Coming from a Libertarian, I -- I get a sense that
21 I must misunderstand you, but I don't know where it is.

22 (Laughter.)

23 MR. LINGER: I'm saying that I -- I don't -- I
24 don't think courts should ever go out and look for cases
25 in advance. We look at the case that is --

1 JUSTICE SOUTER: No, but we are -- we have got
2 to look around the corner.

3 MR. LINGER: -- about the effects.

4 JUSTICE SOUTER: And -- and if you're issuing
5 the invitation to come up with a different rule for
6 Republicans and Democrats and Libertarians, I think you're
7 asking for trouble and we would be asking for trouble if
8 we accepted that invitation.

9 MR. LINGER: No. I'm -- and as I said before, I
10 think the political party should be the one that defines
11 its integrity --

12 JUSTICE BREYER: Then -- then if you say that --
13 I want you to just respond in detail to the questions that
14 I think Justice Scalia and Justice Souter were asking, as
15 I understand it, putting it dramatically, that if you win
16 this case, Alaska's system becomes the Constitution of the
17 United States. Now, that I know you think is not so, and
18 I want to know why.

19 MR. LINGER: Because, number one, first, let's
20 eliminate the 21 States that do not have political party
21 registration. They would not -- in fact, the -- the
22 problem that we're worried about here, draining, and --
23 and the problem is going to happen simply because people
24 in those States, like President Bush's Texas, are free
25 from election to election to go to any primary they

1 want to --

2 JUSTICE SCALIA: That's the same as election
3 system -- that's the same as Alaska's system. Right? I
4 mean, it boils down to the same thing. It boils down to
5 an open primary, doesn't it?

6 MR. LINGER: Justice Scalia, I respectfully
7 disagree because Alaska, unlike Texas, has political party
8 registration. Also, they have a party option. And most
9 States that have political party registration, in fact,
10 have a sort of two-tier system where they recognize it
11 would be discriminatory to treat major parties and small
12 political parties the same. Most of them like, for
13 example, the amici States here of New Mexico, Maryland,
14 they have political conventions for their -- they
15 recognize that that is something that shouldn't be applied
16 to the smaller parties.

17 But Oklahoma, of course, mandates primaries.
18 The Libertarians of Oklahoma are forced to have primaries.
19 They're forced to live under what is the most restrictive
20 ballot access and ballot retention laws, which limits the
21 amount of time they could be on the ballot.

22 The voter registration laws, as was cited in the
23 record of this case, as the trial judge found, of the 29
24 States that have political party registration, essentially
25 26 of them have -- they have free and open registration.

1 There are very few that limit things across the board like
2 Oklahoma does, and that's what makes this case unique.

3 And I think the footnote 13 in Tashjian talked
4 about looking at the particular facts and circumstances.
5 I think this case gives the Court an opportunity to fully
6 expand on that footnote, the full footnote, of course, as
7 I cited in the brief for the respondents, and that is to
8 say that all these are factors when you're analyzing any
9 State. Is -- does it have political party registration?
10 Does it mandate primaries for even the little parties?
11 How much time is available to change your registration as
12 new parties come up?

13 The New -- State of New Hampshire, of course,
14 has found a way to deal with this problem, which Oklahoma
15 hasn't, which is that they allow new parties that are just
16 recognized. Where many voters didn't have the opportunity
17 to register in that party, they have an open primary.
18 That's one way to deal with it.

19 But the point is Oklahoma didn't even think
20 about that. As we pointed out in our brief, the sore
21 loser provision where you have to be affiliated with a
22 party for 6 months -- the legislature -- when the first
23 time the Libertarians got on the ballot 25 years ago, they
24 didn't even realize that there was no way you could be
25 affiliated with a party for 6 months because you couldn't

1 register with it.

2 And the law and the workings of all these
3 registration laws in Oklahoma, because they are so
4 restrictive, prevent the Libertarian Party to get in the
5 position that the major parties have because they simply
6 can't get their people registered and stay registered with
7 the Libertarian Party because they're constantly being
8 purged and they're -- the people are frustrated.

9 JUSTICE BREYER: Would there be a way --
10 suppose, for hypothetical purposes, the Court were to say
11 -- you got a ruling that said there is no rule in the
12 Constitution that forbids a State, as a general matter, to
13 forbid this cross registration, this jumping, for a
14 reasonable time. But a reasonable time has to take into
15 account the interests of minor as well as major parties.
16 Now are you foreclosed because of the circumstances of
17 this case from litigating whether 8 weeks is a reasonable
18 time and whether the disjunct between the period where you
19 become a party and that 8 weeks is unreasonable in the
20 circumstances or other specific things that you say work
21 to the disadvantage of the Libertarians?

22 MR. LINGER: I think that's something
23 reasonable, but in this case it is unreasonable because
24 you simply don't have the opportunity to register.
25 Remember this --

1 JUSTICE GINSBURG: I thought your case was you
2 want to appeal to people who don't want to register as
3 Libertarians and don't even want to be independent. You
4 want to appeal to people who are and want to be members of
5 the Republican or Democratic Party but have Libertarian
6 leanings, but they don't want to give up their party
7 affiliation.

8 MR. LINGER: That -- that is part of the appeal.
9 There are obviously some people simply because of family
10 tradition or it may help them with their job or because
11 the Libertarians are controversial, some people may want
12 to keep it quiet and don't formally affiliate other than
13 they might wish to vote. But our appeal and request was
14 not simply those people but to many people, the vast
15 majority of Oklahomans who never vote --

16 JUSTICE SCALIA: The last category could --
17 could register as independents. I mean, if they're
18 ashamed of -- of the L word, they -- they could just
19 register as independents. Right?

20 MR. LINGER: A person can do that, yes. And, of
21 course, independents are growing. I think, as you know --

22 JUSTICE GINSBURG: Yes, but that you could do
23 right now, and you say that's not enough. We want people
24 who are members of other parties and don't want to change
25 their party affiliation.

1 MR. LINGER: We would like -- first, when you
2 have competition in ideals and in politics, it's always a
3 continuing process, and they're hoping to win all these
4 people over. They don't want these people to stay in
5 other political parties, but they are opening it up
6 because they have such a limited period of time in
7 Oklahoma when people can formally affiliate with the
8 Libertarian Party or, for that matter, any newly
9 recognized party.

10 Think of it this way. When counsel was talking
11 about the Rosario case where you -- the -- the State was
12 allowed to have 8 to 11 months and the Court found that
13 was acceptable to change your registration or the older
14 case of Kusper v. Pontikes where the Court found that 23
15 months in -- in advance to change your affiliation was too
16 much, in Oklahoma, whether it's 23 months before the newly
17 affiliate party gets recognized or 8 to 11 months, you
18 can't register with that party. So if it was unreasonable
19 in Kusper v. Pontikes but was reasonable in Rosario, the
20 point is under either of those time periods, in Oklahoma
21 you can't register with a newly recognized political
22 party. So how can that be reasonable?

23 The Libertarians do not have the opportunity.
24 Newly recognized parties under Oklahoma law do not have
25 the opportunity to get their people in in time, to the

1 extent they could, as demonstrated in the record by States
2 of similar population like Kansas and Arizona and, as I
3 noted in the brief, Oregon where there are substantially
4 more --

5 JUSTICE SCALIA: What did -- what did you seek
6 in this action? What did you seek in this action? Did --
7 did you seek just more time to -- to register? I -- I
8 thought you -- you sought to overturn the -- the system
9 entirely and -- I mean, maybe you asked for too much.

10 MR. LINGER: As -- as to the Libertarians, we
11 asked that we have a party-option open primary, which I
12 think is acceptable, and it's what New Hampshire does.

13 JUSTICE SCALIA: So more -- more time might be
14 -- might be a good idea, but that wouldn't satisfy your --
15 your complaint here.

16 MR. LINGER: If you go -- if you go --

17 JUSTICE SCALIA: Your -- your complaint is no
18 matter how much time you're given --

19 MR. LINGER: The -- the legislature -- if -- if
20 the law is overturned and the Tenth Circuit is affirmed,
21 the legislature might go back in then and address the
22 problem and they might come up with some solution as they
23 did back in 1980 when it became apparent to them that they
24 had set up a system where Libertarian candidates couldn't
25 be candidates for State office because they couldn't be

1 affiliated with a party with 6 -- for 6 months. They made
2 the change that is set forth in the statute that allows 15
3 days after the party is recognized.

4 It might very well be that a possibility the
5 legislature could pursue that could solve this problem, a
6 problem created by the State of Oklahoma, would be to
7 allow a period of time after a party is recognized for
8 voters, not just candidates, but for people who just want
9 to vote in the primary to change. That might be one
10 solution.

11 Or it might be, as in the State of New
12 Hampshire, where they allow that if it's a newly
13 recognized party and we recognize that all these people in
14 the State never had the opportunity to register in this
15 party, then they will have an open primary there.

16 So I don't think there's one solution for this
17 problem, and I think when the law, hopefully, is held to
18 be unconstitutional as it applies to Libertarians, then
19 the Oklahoma legislature can come in and perhaps remedy
20 the situation then.

21 Now, this -- this case is one in which there are
22 some other factors that have to be considered, and that is
23 the importance that is put on First Amendment rights to
24 political association. The State of Oklahoma, contrary to
25 the brief of the petitioners, has not been overburdened

1 with minor political parties. It is a State in which only
2 in presidential elections, by petitioning, have parties
3 even been able to gain ballot status.

4 The State has also a very severe -- the trial
5 judge in this case found that the retention requirement of
6 10 percent for every general election for the top of the
7 ticket was very difficult. The finding was that the
8 registration here was among -- very limited and among the
9 most difficult.

10 And finally, the State has imposed, I think
11 unwisely, primaries on these small political parties.

12 But other than the Libertarians and the Reform
13 Party, there have been no other minor parties on the
14 Oklahoma ballot. In this situation, we have to say to
15 ourselves, as the trial judge in fact commented on, is
16 whether or not the law is simply the result of the
17 concerns of the major parties. I do not think that the
18 State legislature in Oklahoma went out of its way to try
19 to interfere with the rights of Libertarians. I just
20 think that they never really considered them, and that is
21 why this Court has said on a number of occasions that when
22 the rights of independent voters and small parties are
23 impacted by legislation, that this Court should exercise
24 more strict and careful scrutiny there because --

25 JUSTICE GINSBURG: But how does that square with

1 Timmons where this Court turned away a party that says,
2 we've got this candidate and she's running on a major
3 party ticket and she's happy to be on ours too? And the
4 Court there said the State can legitimately eliminate --
5 limit the candidate to one party affiliation. So if it
6 can limit the candidate to one party affiliation, why not
7 the voter?

8 MR. LINGER: Because that was a candidacy right,
9 what the candidate was going to do, and in that particular
10 case, this Court noted that the candidate of the
11 Democratic-Farmer-Labor Party had a choice. That
12 candidate could have chosen to be the candidate of the
13 new party or that he could stay, as he did, with the
14 Democratic-Farmer-Labor Party.

15 We don't have the choice here. They wanted to
16 have him be the candidate of both parties at the same
17 time. We recognize that the State may properly limit each
18 voter to a single nominating act, to a single vote, and
19 we're not asking that. We're not asking that the State
20 not be allowed to set reasonable times to let them know
21 about what we're going to do.

22 But in Timmons -- and I think Timmons is what
23 led the district court astray here was what was not
24 recognized was that there was a choice allowed in Timmons,
25 and there's not a choice here. If -- if this had been in

1 Oklahoma, in -- in that regard, there would have been no
2 way for -- there's no way for a voter who's in the
3 Republican or Democratic Parties who wants to vote in the
4 Libertarian Party because of the unreasonable deadlines to
5 change and because of the lack of opportunity, there's no
6 way that they can register. So they don't have the choice
7 to register as a Libertarian, as the candidate of the
8 Democratic-Farmer-Labor Party did in Timmons, to change if
9 he wanted to. He chose to stay in the major party. But
10 that is one significant difference with Timmons.

11 And also, of course, I couldn't -- I would also
12 want to mention that Minnesota is a State that has no
13 political party registration. So once again, the problem
14 and issues we're confronted with here could not occur in
15 Minnesota. But I think that's significant.

16 And there was -- there was nothing on any voter
17 that would have kept them from being able to vote for that
18 particular candidate in the general election. They were
19 going to be -- he was going to be on the ballot in the
20 general election. In this case, the voters that don't
21 have the choice that that candidate did in Timmons, they
22 are not going to be able to express their opinion on a
23 party that they would like to express an opinion in -- in
24 their primary. And I think that is a very important
25 distinction.

1 I think that oftentimes in the standard that the
2 court uses, that there is a difference, sometimes
3 depending on which particular judge writes the decision on
4 how a standard is explained. But in this case, it is, as
5 the Tenth Circuit said and as the district court
6 recognized, something that lies between this Court's
7 decision in Tashjian and this Court's decision in
8 California Democratic Party v. Jones. But in both those
9 cases, the Court recognized and called for exacting
10 scrutiny when a law was impacting a party's choice as to
11 how it wishes to choose its nominees. I do not think that
12 the rationale come up by the State, this thing about
13 draining, taking -- keeping the disloyal voters in the
14 Republican and Democratic Party and not letting them come
15 over, whether they wouldn't have voted at all, or whether
16 they didn't have the chance to register as Libertarians,
17 or whether they simply are inspired by the particular
18 candidates, I don't think in that situation that that is
19 either a compelling interest by the State and I certainly
20 don't think it is rational. And in fact, as far as being
21 paternalistic, I think the State is totally wrong there
22 because I think this would actually benefit the major
23 parties.

24 But I am saying to you that this is limited,
25 under the Tenth Circuit's decision, to the facts in

1 Oklahoma. And in other States, what the States can say
2 there, if it comes up, is what is a difference between us
3 and Oklahoma on ballot access and ballot retention, on
4 voter registration laws, on requirements. Do we allow,
5 like a number of the amici States, to have our minor
6 parties select by political party convention? But all of
7 this --

8 JUSTICE SCALIA: What are the mici States? You
9 said this a couple -- what are mici States? Mici States
10 did you say?

11 MR. LINGER: The amici, amicus --

12 JUSTICE SCALIA: Oh, the --

13 MR. LINGER: -- amici.

14 JUSTICE SCALIA: Okay. I thought you were
15 saying mici.

16 MR. LINGER: Amici. Okay.

17 In any event, we ask that the Court, when it
18 fully considers this, under the particular facts and
19 circumstances in this case and the record, that the Court
20 will affirm the decision of the United States Court of
21 Appeals for the Tenth Circuit.

22 JUSTICE STEVENS: Thank you, Mr. Linger.

23 Mr. Poe, you have about 3 minutes.

24 REBUTTAL ARGUMENT OF WELLON B. POE, JR.

25 ON BEHALF OF THE PETITIONERS

1 MR. POE: I will try and be brief, Your Honor.

2 The important thing to remember, in regards to
3 most of respondents' argument today and in their brief, is
4 that the events and the hurdles they are challenging now
5 were -- have never been raised at any time prior to this
6 briefing and this hearing. The district court did not
7 make findings as to the difficulty of the ballot access or
8 the ballot qualifications. He merely set forth what those
9 were. The Tenth Circuit never even addressed anything in
10 regards to ballot access or ballot qualifications and in
11 relation to the need to open up a primary. And in the
12 complaint, at the joint appendix page 22, the specific
13 relief sought by the respondents is to have section 1-
14 104, which is the semi-closed primary section -- have it
15 declared unconstitutional. There's no mention of any
16 other relief sought. No other section, the election
17 primary scheme, or anything else mentioned in their
18 complaint. It's never been raised before and it's never
19 been addressed by any court and -- and should not be
20 addressed by this Court at this point in time. There are
21 no findings for this Court to rely on to review the
22 allegations that have been made today.

23 Where the district court -- or where the Tenth
24 Circuit did error specifically is they found, as a matter of
25 fact or as a matter of law, based on Jones and Tashjian,

1 that any infringement upon a party's ability to associate
2 is a compelling -- must -- is subject to strict scrutiny
3 and requires a compelling State interest. Jones
4 specifically says that is not the case. Tashjian implies
5 that that is not the case. And the cases since Tashjian's
6 time say a compelling State interest is not always the
7 appropriate test. You look to the injury and then you
8 look to the burdens.

9 In this case, the appropriate burden -- or the
10 appropriate injury is not severe. They are reasonable
11 restrictions placed on Oklahoma to maintain the integrity
12 of its political system and its election system. With
13 that, the restrictions on -- in the Oklahoma statutes are
14 reasonable restrictions that govern and control and
15 support important State interests.

16 For that reason, the Tenth Circuit was
17 incorrect. The district court was correct in its
18 analysis, and we would ask that this Court reverse that
19 decision and find that those statutes are constitutional.
20 Thank you.

21 JUSTICE STEVENS: Thank you, Mr. Poe.

22 The case is submitted.

23 (Whereupon, at 12:00 p.m., the case in the
24 above-entitled matter was submitted.)

25