

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.

24

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4 On behalf of Petitioners New York State

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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 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 Court 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, the election for the delegates.

13 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 there was reasonable access to general
18 election, you can structure and stifle the primary
19 any way the State --

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 if there's -- isn't there a constitutional principle
25 that we are entitled and that we must look at the

1 fairness of the primary system insofar as participation
2 of the voters?

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

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

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

1 election?

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

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

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

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

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

24 JUSTICE SCALIA: Although if we -- if we
25 hold it unconstitutional for the State to require it, I

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

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

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

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

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

1 the party? What if the parties said, we don't want to
2 select our candidates this way? Is it clear that the
3 State could impose it upon them?

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

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

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

24 MR. OLSON: Well, what this Court has said
25 in the California Republican Party v. Jones case, a cite

1 quoting the Eu case, the Eu case that the Court had
2 decided before, is that the political party has the
3 right to select its leadership, to select its nominating
4 process, to select its candidates, and to exclude
5 members. So, Justice Ginsburg, the party has the right,
6 even arbitrarily, as long as the Fourteenth Amendment is
7 not violated in an election context, to exclude members
8 of its party.

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

13 MR. OLSON: By primary or -- or by
14 convention.

15 JUSTICE SCALIA: Or by convention.

16 MR. OLSON: Right.

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

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

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

1 in agreement.

2 MR. OLSON: Yes. Yes.

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

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

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

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

25 They do not have a right to belong to the

1 Democratic Party or the Republican Party. The rank and
2 file, so forth -- the definition of "insurgent," which
3 is at the other side of the table here, are people that
4 are rebelling against the duly elected leadership of the
5 political party.

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

11 MR. OLSON: If I may be --

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

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

25 Let me say -- let me enumerate the ways. An

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

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

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

24 So in answer to your question,
25 Justice Kennedy, to the extent that your statement of

1 the principle with respect to access to both the primary
2 and the general election is -- is the law of this Court,
3 then that access exists here.

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

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

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

25 JUSTICE SCALIA: Yes. I want a case where

1 the State did not impose the restriction and it was up
2 to us to decide whether the State could do that or not,
3 but rather the State said the party can do whatever it
4 wants, and we have disallowed what the party itself
5 chose under no compulsion from the State --

6 MR. OLSON: Aside --

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

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

11 JUSTICE SCALIA: -- or the Thirteenth
12 Amendment.

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

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

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

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

3 JUSTICE KENNEDY: This would be a
4 State-mandated party primary for --

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

6 JUSTICE KENNEDY: -- election --

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

12 JUSTICE STEVENS: Well, what about the Kasper
13 case --

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

19 If I might, Mr. Chief Justice, may I reserve
20 --

21 JUSTICE STEVENS: Isn't Justice Kennedy
22 asking if the Kasper case was correctly decided?

23 MR. OLSON: Well, I'm not -- I think I tried
24 to answer that the best I could by saying that I think
25 the import of the cases, without getting into the

1 specifics of that, are that if you have a reasonable
2 access by individuals or political parties to the
3 electoral process, that satisfies the Constitution.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Olson.

6 Mr. Rossman.

7 ORAL ARGUMENT OF ANDREW J. ROSSMAN
8 ON BEHALF OF PETITIONERS NEW YORK COUNTY
9 DEMOCRATIC COMMITTEE ET AL.

10 MR. ROSSMAN: Mr. Chief Justice, and may it
11 please the Court:

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

18 And secondly, I would say that in
19 considering that question, Justice Kennedy, the
20 important thing is to consider what is the intended role
21 that the State gives to the participants in this
22 process? And what the role here is that individual
23 voters have the opportunity to vote for local delegates
24 who are to represent their interests at the convention.
25 As Cousins instructs, once they have the opportunity to

1 pull a lever for the delegate that shares their values
2 and their preferences, their right of suffrage is
3 satisfied.

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

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

22 That's the difference between a convention
23 and a primary. We think it's a critical one here. So
24 the cases --

25 JUSTICE GINSBURG: In practice, how many

1 people other than the slate selected by the party
2 leaders run in New York for this delegate position?

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

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

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

21 MR. ROSSMAN: Correct.

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

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

3 JUSTICE BREYER: It's not?

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

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

24 MR. ROSSMAN: Let me respond to the most
25 difficult part of your question first, which is the

1 constitutional of the party leader selecting a
2 candidate we think is not troublesome at all. In fact,
3 there are many instances in New York and in other States
4 where the political leaders, through their structure, do
5 pick the candidates, for example in the case of vacancy
6 elections, which this Court upheld as constitutional in
7 the Rodriguez case.

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

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

24 MR. ROSSMAN: Well, in fact, we think that is the
25 very judgment that the State has made here. And when,

1 as Mr. Olson said, when it went from a primary to a
2 convention process, the idea behind it in part was that
3 the delegates could be more educated, would be expected
4 to be more educated than rank-and-file voters would be
5 about judges. And the evidence in this case is that
6 rank-and-file voters are not educated hardly at all
7 about the judge candidates that they select. So we
8 think this is clearly a legislative sensible policy
9 choice to put the selection process in the hands of
10 those who have the motivation and the opportunity to
11 become more educated about those that they're selecting.

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

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

1 associate with particular individuals. And that's a
2 choice that's made here by duly elected leaders of the
3 parties.

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

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

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

1 MR. ROSSMAN: Well, the only system that New
2 York is forcing is a bare framework for representative
3 democracy. It's a convention. It's no different than
4 --

5 JUSTICE SCALIA: Well, the parties are not
6 protesting in this case, are they?

7 MR. ROSSMAN: Absolutely not.

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

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

17 JUSTICE SCALIA: In fact, it is probably
18 likely the parties got this system adopted by the New
19 York Legislature.

20 MR. ROSSMAN: Well, however the legislative
21 process has unfolded, in 1921, multiple times since, and
22 to the present when the legislature filed an amicus
23 brief with the Second Circuit, the legislature has
24 clearly been in support of this. And we think it's
25 within -- it's a core State power, it's a sensible

1 legislative choice that they have made. It's within
2 the contours of *American Party of Texas v. White*, which
3 recognized, as Justice Scalia observed moments ago, that
4 the State can choose to have primaries or conventions.

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

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Rossman.

23 Mr. Schwarz.

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

25 ON BEHALF OF THE RESPONDENTS

1 MR. SCHWARZ: Mr. Chief Justice, and may it
2 please the Court:

3 On a robust record, the district court,
4 confirmed in great detail by the Second Circuit, found
5 that there were severe burdens placed upon insurgents
6 and placed upon party members who wished to band
7 together to support a candidate. They found --

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

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

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

23 Secondly, the courts analyzed the burden in
24 terms of the difficulty of assembling and running a
25 slate of delegates, a slate that cut across the various

1 assembly districts, and the court found --

2 JUSTICE ALITO: Assuming that the plaintiffs
3 have associational rights at stake here, isn't this a
4 case where there's a conflict between two associational
5 -- two sets of rights of association? You have the
6 party hierarchy who wants to, in your own words, fence
7 out the insurgents. That's a right not to associate.
8 And then you have the insurgents who want to be fenced
9 in?

10 MR. SCHWARZ: Well, the --

11 JUSTICE ALITO: Isn't that different from
12 the cases that you rely on?

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

18 JUSTICE ALITO: But that's charged language:
19 They have the right to stifle the insurgents.

20 MR. SCHWARZ: Okay. But --

21 JUSTICE ALITO: Do they not -- does not the
22 right of association include the right not to associate?

23 MR. SCHWARZ: I think, Your Honor, the right
24 of association does not include the right to use an
25 election system imposed by the State which makes it

1 impossible. That's where the burden comes from. It's
2 because the State has imposed this system on every
3 party. So I do not think there is a countervailing
4 right on the other side.

5 JUSTICE KENNEDY: What are your -- what are
6 you best cases for that proposition?

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

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

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

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

1 I would start with Storer and Storer says, in
2 assessing severe burden, what you want to look at is the
3 -- is the realistic effect of whether people have gotten
4 on the ballot. And Storer says if you find that happens
5 rarely, while it's not conclusive, it's the -- it's
6 indicative that there is a severe burden.

7 JUSTICE GINSBURG: But Storer --

8 CHIEF JUSTICE ROBERTS: Isn't that a general
9 election case?

10 JUSTICE SCALIA: That's a general election
11 case, isn't it?

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

17 CHIEF JUSTICE ROBERTS: Well, let me ask you
18 about that.

19 JUSTICE SOUTER: But even -- please.

20 MR. SCHWARZ: Please.

21 CHIEF JUSTICE ROBERTS: Let's suppose a
22 State doesn't think that direct voter election of judges
23 is a good idea, that it thinks there ought to be some
24 insulation to avoid the problems of judges campaigning
25 and raising money and all that; yet, at the same time

1 they want some participation by the voters in the
2 process. Is there any way they can achieve that
3 objective, to have the nominees actually chosen not by
4 the voters but by a convention, and yet have some role
5 by the voters?

6 MR. SCHWARZ: There absolutely is, Your
7 Honor. We do not claim here that any convention is
8 inappropriate. Conventions are appropriate.

9 CHIEF JUSTICE ROBERTS: No, I'm just asking
10 is there a way to have a convention with some role by
11 the voters or the party members?

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

16 CHIEF JUSTICE ROBERTS: But doesn't that
17 seem kind of odd, that if a State can have no role for
18 voters, it can have a pure convention, that they're
19 penalized if they have some role for voters?

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

22 CHIEF JUSTICE ROBERTS: Being found
23 unconstitutional is a pretty severe penalty.

24 (Laughter.)

25 MR. SCHWARZ: But it's what we seek and we

1 think the courts below appropriately granted, Your
2 Honor. The -- but it's not penalizing the State for
3 doing something; it's saying if do you this, and if you
4 severely burden, as after an extensive factfinding
5 hearing the courts held the statutes do, then you have to
6 show that there's a compelling justification.

7 JUSTICE SOUTER: But Mr. Schwarz --

8 JUSTICE SCALIA: I'm sorry,
9 go ahead.

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

21 And that burden is -- is focused on two
22 points: number one, the entrenched power of the
23 political bosses; and number two, the difficulty --
24 well, I guess three points -- the difficulty of
25 fielding, for a dissident to field a whole slate of

1 candidates who in effect, once elected, would make the
2 nomination desired; or, three, the capacity of the
3 intending or the aspiring candidate to influence the
4 delegates directly once they're selected, because the
5 time is short.

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

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

25 Now, should it matter because here the

1 primary or the election -- it's really an election but
2 the State happens to call it a primary -- should it
3 matter that that is in the preliminary stage, in the
4 nomination stage?

5 I would suggest it should not.

6 Now, I think your --

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

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

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

1 MR. SCHWARZ: I think I would like to draw a
2 distinction between the law as I think you've described
3 it and a different law that Justice Scalia described. I
4 think the law that Justice Scalia described would be
5 constitutional. If what the State did is to say, you
6 the party decide on what to do, I think the State is
7 then not putting a thumb on the scale; the State is not
8 interfering with the disputes within the party.

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

14 JUSTICE SOUTER: But the party isn't
15 objecting.

16 MR. SCHWARZ: Well, Your Honor, I think
17 that --

18 JUSTICE SOUTER: The party -- the party
19 likes it.

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

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

1 And that's why, it seems to me, that the
2 hypo that I pose is not significantly different,
3 provided the parties aren't objecting, in which we have
4 a different case.

5 But it seems to me that my hypo is not
6 significantly different from the one that gave rise to
7 the question that Mr. Rossman answered.

8 MR. SCHWARZ: Well, the -- first, on the
9 consent of the party leaders, which is really what we
10 have here, of course they are -- they like the system
11 because the State system entrenches them.

12 And -- and this Court --

13 JUSTICE SOUTER: Well, the Federal system in
14 practice entrenches United States Senators.

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

22 MR. SCHWARZ: No, because the Federal
23 system provides that there shall not be elections. Here
24 elections --

25 JUSTICE SOUTER: Sure. And in my hypo the

1 only election is the election for the party boss.

2 MR. SCHWARZ: Well, I would still suggest,
3 Your Honor, that, as we see the case that would be
4 unconstitutional. But our case is much stronger than
5 that because, in any event, there is here an election
6 for delegates.

7 JUSTICE SOUTER: Okay. But isn't your
8 argument still that, because there is a limitation on
9 the participation of the intending judicial candidate,
10 there is ultimately a constitutional problem?

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

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

23 JUSTICE SOUTER: Sure. They -- for
24 political reasons, they're saying: We don't like you.
25 There are -- there are a lot of people who go to United

1 States Senators, and the United States Senators say:
2 Scram; we don't -- we don't like you; your politics
3 aren't good enough for us.

4 And so I'm not saying that -- that -- on my
5 hypo the person who lobbies the bosses directly is -- is
6 claiming a right to success. I think they're claiming a
7 right to have a chance to influence the process. And
8 why don't they have the chance by going to the boss?

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

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

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

24 (Laughter.)

25 MR. SCHWARZ: But the -- you know, this

1 isn't an issue that divides by ideology. It's --
2 really, the question here is if you have a statute that
3 makes it difficult for the voters to participate, to
4 have a voice. That's really the question. And if I
5 could use something that the Board of Elections' brief
6 conceded in both their reply and their opening brief,
7 they said a person -- they said that party members who
8 wanted to attempt to assemble a slate to try to
9 influence the decision at the convention would be "well
10 served" -- that's their exact words -- to assemble and
11 run a slate. But the district court and the circuit
12 court found that it was impossible -- severely
13 burdensome, actually impossible -- for that burden to be
14 met.

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

21 MR. SCHWARZ: If it said delegates will be
22 selected --

23 JUSTICE STEVENS: By party officials.

24 MR. SCHWARZ: I'm not sure about that. I'm
25 not -- I think that -- I'm not sure. I think it's

1 different than Justice Souter's hypothetical.

2 JUSTICE STEVENS: I'm just saying just
3 eliminate this whole folderol about picking delegates
4 and say the county chairman shall pick the delegates,
5 period. I don't see why that would be unconstitutional.

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

17 JUSTICE STEVENS: Mr. Schwarz, you're
18 talking about the election of the judge or the election
19 of the delegate? I think you're mixing two oranges and
20 apples there.

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

1 JUSTICE STEVENS: It -- the evidence shows
2 the thumb on the scale is just as strong as if the party
3 chairman picked the delegates. And, therefore, it seems
4 to me, it presents the question of whether it would be
5 unconstitutional to enact a statute that allows the
6 party chairman to pick the delegates.

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

8 JUSTICE BREYER: Well, if you're not sure,
9 it's difficult --

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

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

20 JUSTICE SOUTER: No, but what you are
21 calling -- and correct me if I am wrong. Maybe I
22 misunderstand this. I think what you are calling the
23 severe burden is the difficulty of assembling a whole
24 slate that can control the meeting or have a majority in
25 the ultimate meeting of that delegates, of those

1 delegates, and therefore actually select the candidate
2 who wants to put the slate together. And it's control
3 over result rather than the capacity of any individual
4 to get elected a delegate which I think you are
5 objecting to. Am I wrong?

6 MR. SCHWARZ: We have never said that
7 there's a right to win. We have only said there's a
8 right to meaningfully participate.

9 JUSTICE SOUTER: Yes, but when you say
10 "meaningfully participate" you talk about putting -- and
11 candidly talk about putting -- a slate of delegates
12 together.

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

24 MR. SCHWARZ: No. It's a compete argument,
25 not an access argument. And I do think the Constitution

1 should be read to say that if the State passes laws that
2 make it very hard for voters to band together or for
3 insurgent candidates to compete, then -- and it is a
4 severe burden, they have to justify it. And, by the
5 way, they haven't sought in their papers to justify it.

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

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

23 JUSTICE SCALIA: Of course not. You're
24 really arguing against the whole purpose of this scheme,
25 which is not to have judges popularly elected. And

1 you're saying no, we want them popularly elected. The
2 purpose of the scheme is to -- is to have the people
3 elect delegates and have delegates use their good
4 judgment as to who -- as to who the best judge would
5 be. But you say, no, we want the people to have an
6 input. I mean, it's contrary to the whole purpose of
7 the scheme. Of course it works the way you say it does.
8 It is designed to work that way. It's a basic judgment
9 not to have judges popularly elected, and your objection
10 amounts to saying no, judges ought to be popularly
11 elected.

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

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

19 MR. SCHWARZ: Yes.

20 CHIEF JUSTICE ROBERTS: -- the other side
21 says that your argument is -- is implicated whenever the
22 convention leads to a different nominee than the
23 primary.

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

25 CHIEF JUSTICE ROBERTS: You don't think

1 there's anything wrong with the convention deciding that
2 the nominee is going to be someone other than the person
3 who would prevail in the primary election.

4 MR. SCHWARZ: There is nothing wrong with
5 that, Your Honor.

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Well, is that
2 because Mr. Dunne was not supported by the party members
3 at the convention --

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

5 CHIEF JUSTICE ROBERTS: -- for whatever his
6 prior offices had been --

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

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

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

16 CHIEF JUSTICE ROBERTS: 500 signatures,
17 right?

18 MR. SCHWARZ: He needs the 500 signatures.

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

21 MR. SCHWARZ: I think we have a difficult
22 case, if you don't think that's a sufficient burden. If
23 you think --

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

1 MR. SCHWARZ: No, I -- I'm not -- I'm
2 agreeing with the Chief Justice that I think that, if
3 you thought that just running for one delegate slot was
4 sufficient to solve the problem of a State statute that
5 was designed -- their words, their admission -- to
6 entrench the power of the party leaders, I think that
7 gives us a problem.

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

13 MR. SCHWARZ: The safety valve being?

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

19 MR. SCHWARZ: Well --

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

22 MR. SCHWARZ: The record, Your Honor, and
23 this is an extensive record, shows that the party
24 leaders can choose and do choose people who are, to use
25 your word, who are --

1 JUSTICE BREYER: You don't like that.
2 That's why I say you have to answer it. If you feel
3 that that's so terrible, then you say no, the
4 Constitution forbids that, though you'd have to explain,
5 wouldn't you, why, with all its faults, that is not
6 better in the judgment of New York than a system where
7 people raise \$4 million from the lawyers in order to run
8 for office?

9 MR. SCHWARZ: We -- no, we -- we have not
10 said that there needs to be a primary. We haven't said
11 that. And sometimes our opponents leave the impression
12 that we have said that. We haven't said that.

13 You know, there are -- get rid of the
14 leaders --

15 JUSTICE GINSBURG: That's the -- that's the
16 remedy that, the temporary remedy, that you sought or --
17 because -- at the bottom line, the court's order was, until New
18 York reacts to this decision, the candidates will be
19 chosen by primary.

20 MR. SCHWARZ: Yes, the -- but the judge,
21 Your Honor -- the judge did two things in imposing that
22 remedy, three or four things actually:

23 He said, first, I'm not going to
24 micromanage. I think the statutes are unconstitutional.
25 I'm not going to get into all the details of fixing it

1 because the legislature should do that and the Federal
2 courts shouldn't do that.

3 Second, he relied on the fact that the
4 fall-back position in the State statutes is there is a
5 primary if there is no other system in place.

6 But, third and most important, he stayed his
7 decision to give the legislature time to address the
8 question, and they were well on their way to addressing
9 it when this Court gave us the opportunity to be here.

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

13 MR. SCHWARZ: No, they -- they're entitled
14 to do that.

15 CHIEF JUSTICE ROBERTS: I know they are
16 entitled to it.

17 MR. SCHWARZ: Well, the --

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

20 MR. SCHWARZ: If you look at the amicus
21 briefs filed in our favor, the State bar, the City bar,
22 the Fund for the Modern Courts, the City of New York all
23 filed a brief in which they say, we think the right
24 solution is to have an appointive system, and they're
25 working to try to have that happen. And the Governor

1 has put forward a bill for an appointive system. But,
2 they say --

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

5 (Laughter.)

6 MR. SCHWARZ: No, not --

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

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

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

1 confidence in the courts.

2 And that is -- you know -- that is clearly
3 correct --

4 JUSTICE GINSBURG: There was also one view, I
5 think it was, in the Feerick Report that said, the worst
6 thing in the world would be to return us to the primary
7 system this system was intended to replace.

8 MR. SCHWARZ: Yes, the -- actually the
9 Feerick report, which found that the party leaders all
10 over the State forever have always made the picks, they
11 voiced a favoring amending the law. They -- they think
12 the law needs to be amended.

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

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

23 We're -- we're neutral. We just say this
24 law is unconstitutional. And how it should be amended
25 is up to the legislature, but that it should be amended

1 is -- there's a powerful case and, you know, I don't
2 know where I am on the time here, but I commend to you
3 the various amicus briefs that have come in on --

4 JUSTICE STEVENS: They're all policy
5 arguments about why this is a terrible statute. They're
6 not necessarily constitutional arguments.

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

8 JUSTICE STEVENS: And that's a vast
9 difference.

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

16 CHIEF JUSTICE ROBERTS: Well, it's not often
17 you have both the Democratic Party and the Republican
18 Party --

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: -- supporting it
21 either.

22 MR. SCHWARZ: Yes, but then I -- I think you
23 should look at the -- what you've said in -- not you,
24 but your predecessor said in *Eu*, about we've never held
25 that a political party's consent will cure a statute

1 that otherwise is violative and, there are other quotes
2 in Justice Scalia's Tashjian opinion and in -- in
3 several other cases to that effect.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Schwarz.

6 MR. SCHWARZ: Thank you.

7 Mr. Olson, you have 4 minutes remaining.

8 REBUTTAL ARGUMENT OF THEODORE B. OLSON
9 ON BEHALF OF PETITIONERS NEW YORK STATE
10 BOARD OF ELECTIONS ET AL.

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

12 The Second Circuit reinstated what the New
13 York Legislature found to be a bad system, that it
14 discouraged qualified candidates and it encouraged this
15 unfortunate, unseemly race for money.

16 The Respondents just said that that is not
17 what they were interested in doing, but their prayer for
18 their relief, on page 35 of their complaint, calls for a
19 direct primary election for the supreme court.

20 With respect to the Kusper case,
21 Justice Kennedy, I gave that a little bit more thought.
22 That -- that case focused on the fact that the statute
23 was inhibiting the rights of an individual who wanted to
24 participate in a way that the party wanted that
25 individual to participate. That long period of time

1 prevented both the individual and the association from
2 associating together, which is what they wanted to do.

3 JUSTICE KENNEDY: You mean the State, it was
4 a State statute?

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

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

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

24 If the parties wanted to select the
25 delegates or select the candidates to be their standard

1 bearer, that seems to me to be perfectly within the
2 right of an association to do; and would be perfectly
3 appropriate, provided that there was an access for
4 independents and --

5 JUSTICE SCALIA: You're not saying the State
6 could compel that?

7 MR. OLSON: No. No.

8 JUSTICE SCALIA: You're saying that the
9 State could permit it?

10 MR. OLSON: No. But I think those
11 hypothetical questions are could the State vest that
12 authority.

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

21 Between 1900 and 2002 -- this is petition
22 appendix 130 -- nearly one-fourth of the general
23 elections in New York were competitive.

24 Lopez Torres, the Respondent, received 25
25 votes at the 2002 judicial selection convention, and

1 many of the districts in New York are not dominated by a
2 single party.

3 The final point is it is important to
4 emphasize this is a -- a challenge on its face to the
5 statute that simply creates a delegate election and then
6 it creates a convention. Neither of those provisions
7 can possibly be constitutional, and so what the
8 Respondents are complaining about is what party bosses
9 do.

10 But on page 38 of their brief, they state
11 categorically that the constitutional offense is not the
12 fact that party leaders act as one would expect in
13 choosing nominees.

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

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you Mr. Olson.
2 The case is submitted.

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

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