IN THE SUPREME COURT OF THE UNITED STATES

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NEW YORK STATE BOARD OF :

ELECTIONS, ET AL., :

Petitioners :

v. : No. 06-766

MARGARITA LOPEZ TORRES, :

ET AL. :

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Washington, D.C.

Wednesday, October 3, 2007

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

APPEARANCES:

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

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

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P R O C E E D I N G S

(10:02 a.m.)

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

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON.

ON BEHALF OF PETITIONERS NEW YORK STATE BOARD OF ELECTIONS, ET AL.

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

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

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: A hypothetical case.

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

JUSTICE KENNEDY: What about Kusper, the

Kusper case?

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

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

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

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

MR. OLSON: Well, I think that --

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

primary system insofar as participation of the voters?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Or by convention.

MR. OLSON: Right.

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

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

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

MR. OLSON: Yes. Yes.

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

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

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

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

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

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

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

MR. OLSON: I may be --

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

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

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

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

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

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

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

then that access exists here.

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

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

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

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

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

MR. OLSON: Aside --

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

MR. OLSON: Yes. The only cases --

JUSTICE SCALIA: -- or the Thirteenth amendment.

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

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

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

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

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

MR. OLSON: Well, a party might --

JUSTICE KENNEDY: -- election --

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

JUSTICE STEVENS: Well, what about --

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Olson.

Mr. Rossman.

ORAL ARGUMENT OF ANDREW J. ROSSMAN

ON BEHALF OF PETITIONERS NEW YORK COUNTY DEMOCRATIC COMMITTEE ET AL.

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

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

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

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

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

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

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

MR. ROSSMAN: In New York City, the evidence

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

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

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

MR. ROSSMAN: Correct.

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

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

JUSTICE BREYER: It's not?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

--

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

MR. ROSSMAN: Absolutely not.

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

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

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

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

the State can choose to have primaries or conventions.

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Rossman.

Mr. Schwarz.

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

ON BEHALF OF RESPONDENTS

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

On a robust record, the district court,

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

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

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

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

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

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

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

MR. SCHWARZ: Well, the --

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

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

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

MR. SCHWARZ: Okay.

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

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: But Storer --

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

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

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

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

MR. SCHWARZ: Please.

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

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

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

time is short.

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

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

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

I would suggest it should not.

Now, I think your --

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

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

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

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

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

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

JUSTICE SOUTER: But the party isn't objecting.

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

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

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

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

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

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

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

And -- and this Court --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

JUSTICE STEVENS: By party officials.

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

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

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

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

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

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

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

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

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

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

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

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

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

objecting to. Am I wrong?

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

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

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

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

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

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

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

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

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

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

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

MR. SCHWARZ: Yes.

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

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

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

MR. SCHWARZ: There is nothing wrong with

that, Your Honor.

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: 500 signatures, right?

MR. SCHWARZ: He needs the 500 signatures.

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

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

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

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

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

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

MR. SCHWARZ: The safety valve being?

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

MR. SCHWARZ: Well --

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

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

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

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

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

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

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

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

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

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

primary if there is no other system in place.

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

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

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

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

MR. SCHWARZ: Well, the --

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

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

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

(Laughter.)

MR. SCHWARZ: No, not --

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

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

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

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

JUSTICE GINSBURG: There's also one view, I

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

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

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

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

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

JUSTICE STEVENS: They're all policy

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

MR. SCHWARZ: No, they also speak --

JUSTICE STEVENS: And that's a vast difference.

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

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

(Laughter.)

CHIEF JUSTICE ROBERTS: -- supporting it either.

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

CHIEF JUSTICE ROBERTS: Thank you,

Mr. Schwarz.

MR. SCHWARZ: Thank you.

Mr. Olson, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF PETITIONERS NEW YORK STATE BOARD OF ELECTIONS ET AL.

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

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

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

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

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

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

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

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

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

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

MR. OLSON: No. No.

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

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

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

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

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

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

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

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you Mr. Olson.

The case is submitted.

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

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