

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: CALIFORNIA DEMOCRATIC PARTY, ET AL.,  
Petitioners v. BILL JONES, SECRETARY OF STATE OF  
CALIFORNIA, ET AL.

CASE NO: 99-401 c-2

PLACE: Washington, D.C.

DATE: Monday, April 24, 2000

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IN THE SUPREME COURT OF THE UNITED STATES

CALIFORNIA DEMOCRATIC PARTY, :

ET AL., :  
:

**Petitioners :**

v. : No. 99-401

BILL JONES, SECRETARY OF STATE :

OF CALIFORNIA, ET AL. :

-----X

Washington, D.C.

Monday, April 24, 2000

The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at  
14 11:01 a.m.

15 APPEARANCES:

16       GEORGE WATERS, ESQ., Sacramento, California; on behalf of  
17                   the Petitioners.

18 THOMAS F. GEDE, ESQ., Special Assistant Attorney General,  
19 Sacramento, California; on behalf of the Respondents.

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## PROCEEDINGS

(11;01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 99-401, California Democratic Party v. Bill Jones.

Mr. Waters.

ORAL ARGUMENT OF GEORGE WATERS  
ON BEHALF OF THE PETITIONERS

9                           MR. WATERS: Mr. Chief Justice, and may it  
10        please the Court:

11                   This case presents the question of whether the  
12                   State of California can force political parties to choose  
13                   their nominees for public office through a blanket primary  
14                   system which is expressly designed to produce more  
15                   moderate nominees than those that are favored by the  
16                   parties themselves.

Under California law, the only means by which a party can nominate his candidates for the ballot is through the blanket primary system. The blanket primary makes the issue of party affiliation and ideology irrelevant. It allows any voter to cross party lines and to vote in several different party primaries at the very same election. It is a wholesale assault on the party -- political parties' First Amendment right to choose the standard-bearer who best represents the party's ideology.

1                 This case is a direct descendent of this Court's  
2 decision in Tashjian, which held that Connecticut could  
3 not enforce a closed primary law on a party that sought to  
4 open its primary to Independent voters.

5                 QUESTION: Now, open primaries differ from the  
6 blanket primary system imposed here?

7                 MR. WATERS: They differ significantly, Your  
8 Honor. In California -- to begin with the open primary,  
9 the generic open primary exists in a State where there is  
10 no party registration. Voters come to the polling place,  
11 if they're registered they go into the polling place, and  
12 in a class open primary State I believe that they are  
13 given the ballots of any political party and they make a  
14 choice of which party that they vote in.

15                 QUESTION: Well --

16                 MR. WATERS: But they vote within a party, Your  
17 Honor.

18                 QUESTION: -- if we agreed with you here on the  
19 blanket primary thing, wouldn't we be casting some doubt  
20 on the open primary system as well?

21                 MR. WATERS: I don't think so, Your Honor, and I  
22 think that there are quantitative and qualitative decision  
23 differences here between an open primary and a blanket  
24 primary, and if I could go into that, I think the  
25 qualitative difference is that suggested by Justice Powell

1       in his dissent in the LaFollette case, which involved  
2       another issue, but in which Justice Powell discussed at  
3       some length the issue of the validity or the  
4       constitutionality of open and closed primaries.

5                  And Justice Powell's position there was that  
6       what the First Amendment guarantees to the parties is the  
7       right to have -- to limit their nominating process to  
8       voters who affiliate with the party. He said the question  
9       presented in that case, which dealt with Wisconsin, an  
10      open primary State, was whether there was an act of  
11      affiliation. What Justice Powell said is, when a  
12      Wisconsin voter chooses the ballot of a Democratic or  
13      Republican Party, that in itself is an act of affiliation  
14      because that voter is choosing to limit him -- himself or  
15      herself to the nominees of one party.

16                  QUESTION: But isn't that just a matter of  
17      degree, because -- simply because the decision can be made  
18      on the spur of the moment when the voter gets to the  
19      polls? The only right that the voter has in the open  
20      primary State that the voter does not have in the blanket  
21      primary State is the kind of mix-and-match right.

22                  If the voter who has traditionally been either  
23      not registered, or registered as a Republican, takes a  
24      Democratic ballot in the open primary State, there's no  
25      more affiliation between that voter and the party than

1 there is the voter who under the blanket system chooses to  
2 vote for -- in the Democratic primary for Governor and the  
3 Republican primary for State Treasurer.

4 MR. WATERS: Well, I disagree with that, Your  
5 Honor.

6 QUESTION: Why?

7 MR. WATERS: I think that the history of the  
8 American regulation of political parties is distinct, and  
9 what we have is a history where the Government in  
10 virtually every State has operated to try and make it easy  
11 for people to affiliate with a party, but in States that  
12 have party systems, and California has a party system,  
13 Proposition 198 itself, when you register to vote, it's in  
14 Proposition 198 you actually state that you affiliate with  
15 a political party. The fact that --

16 QUESTION: Isn't that a pretty empty formality?

17 MR. WATERS: I think it is not. I think it is  
18 not. I think the Constitution means something, and I  
19 think that the Constitution means that a party has a right  
20 to limit its nominating process to people who affiliate  
21 with it in some sense.

22 QUESTION: Okay. Let's take the --

23 MR. WATERS: I would prefer to have a higher  
24 hurdle.

25 QUESTION: Let's take the example of the party

1       that says, we want our affiliates to be real affiliates,  
2       and therefore we want them to have registered as such at  
3       least 6 months before the primary, or 2 months before the  
4       primary, leaving aside the question of late voter  
5       registration for reasons of transience.

6                  And in a case in a State in which the State law  
7       is, well, you can't require a 30-day affiliation, you  
8       can't require anything more than the instantaneous  
9       affiliation, isn't the sense of affiliation just as  
10      ephemeral there as is the sense of affiliation between in  
11      a blanket primary State the fellow who walks in and says,  
12      I guess I'll vote for a Democrat for Governor and a  
13      Republican in the Treasurer's race?

14                MR. WATERS: Well, no. I mean -- I just  
15      disagree with that, Your Honor. I think that there is a  
16      difference between affiliating -- first of all, I think  
17      one has to assume that in the American system that most  
18      voters operate in good faith, that when they are making --  
19      when they choose a party ballot, that they are choosing  
20      that for a reason, that the Republican ballot means  
21      something to them, a Democratic or a Libertarian ballot  
22      means something to them.

23                QUESTION: Well, you may be right on that, in  
24      which case I take it your argument is, look, we're going  
25      to operate on the premise that an affiliation, even a

1 last-minute one, is at least a bona fide affiliation and  
2 good enough.

3 MR. WATERS: I think we have to do that.

4 QUESTION: And that's different from no  
5 affiliation.

6 MR. WATERS: I think we have to do that to  
7 distinguish a blanket primary from the open primary. I  
8 mean, personally I would much prefer, as would the parties  
9 before you in this case, prefer to have a more significant  
10 gesture of affiliation, and California --

11 QUESTION: Suppose California had a nonpartisan  
12 blanket primary. Suppose it said, we're not going to try  
13 to choose a party's candidate. There isn't -- there's not  
14 going to be that kind of primary. It's going to be a  
15 nonpartisan primary. Would you have any constitutional  
16 objection that you could make if Proposition 198 had been  
17 for a nonpartisan primary instead of a partisan primary?

18 MR. WATERS: I believe the constitutional issue  
19 which we're bringing to you today would not exist there,  
20 because I think in that case the State would not be  
21 commandeering the parties as a vehicle for -- to blend the  
22 political ideologies together.

23 California indeed has a nonpartisan nominating  
24 system for the vast majority of races, those that are not  
25 for Congress, Senate, the Assembly, and State-wide, and

1 there is, indeed, one State-wide office, the  
2 Superintendent of Public Construction, that is elected  
3 through a nonpartisan primary.

4                   QUESTION: Does any State other than, we're  
5 told, Louisiana, have such a nonpartisan system for State-  
6 wide offices?

7                   MR. WATERS: Not that I know of. I believe the  
8 answer to that is no, although I will say that the  
9 evidence at trial did not explore that perhaps in great  
10 depth. I mean, as petitioners -- as plaintiffs we did not  
11 go into great depth in other States. One thing about  
12 Louisiana, because Your Honor just brought it up, which I  
13 think is distinctive, I think Louisiana is a blend. It  
14 presents yet another issue here, in that it is a  
15 nonpartisan primary there in the sense that only two --  
16 the two highest vote-getters go on to the general  
17 election. However, party labels are used on the ballot  
18 there. The candidates have their names followed by  
19 Democrat, Republican, or whatever.

20                  I think that Louisiana might present a different  
21 issue, and that is the use of a party label in their race,  
22 but not the issue that is presented here.

23                  QUESTION: Are you -- is it a consequence of  
24 your answer to Justice Ginsburg that a State really can do  
25 by way of ballot access, if it's clever enough, what it

1 cannot do by way of a blanket primary scheme?

2 MR. WATERS: I don't understand the question,  
3 Your Honor.

4 QUESTION: Let's assume that in a ballot  
5 access -- that it had a ballot access law saying, we will  
6 let the top four vote-getters in the primary, without  
7 reference to party affiliation we'll let the top four  
8 vote-getters in the primary be on the ballot in the  
9 general election. I take it your answer to Justice  
10 Ginsburg is that a State may do that.

11 MR. WATERS: It is indeed, sir.

12 QUESTION: Okay. Wouldn't the result in  
13 practice come out in effect to a series of choices which  
14 are more or less the equivalent of what the voters can do  
15 under the blanket primary scheme?

16 MR. WATERS: I think the result may or may not  
17 be similar to that. I think that in the situation you're  
18 describing the difference -- if California were to go  
19 toward a nonpartisan primary system there would be at  
20 first a significant difference.

21 First of all it's very -- it's not -- there  
22 would have to be some relatively easy means for people to  
23 get on the primary ballot, which is indeed the case now  
24 for California nonpartisan -- or -- yes, for California  
25 nonpartisan races. I mean, there'd have to be some

1       loosening up. I mean, it's very hard for an Independent  
2       candidate in California to get on the general election  
3       ballot. The whole system is designed to force people into  
4       the party system.

5                 If they went nonpartisan, I assume that it would  
6       be -- a result of that would also, there would have to be  
7       relatively easy access to getting on the primary ballot,  
8       and at that point I think each party would have the  
9       access -- I think there might be access questions, but  
10      they'd have to have a way to get on there somehow.

11      Candidates have to get on the primary ballot.

12                 What happens after that might present a whole  
13      range of issues, but the point is that those people,  
14      California would not in a sense be renting the parties, to  
15      use their names to promote false candidates. I mean, that  
16      is not --

17                 QUESTION: So you -- it boils down to two  
18      things. The State cannot in effect allow a person to say,  
19      I am a Democrat, when there has been no act of affiliation  
20      and, number 2, we will assume that acts of affiliation are  
21      basically acts in good faith.

22                 MR. WATERS: Yes, and on the first one it's not  
23      just that there's been no act of affiliation, that indeed,  
24      under Proposition 198 itself, when people register to vote  
25      they are invited to make an affiliation with another

1 party.

2 It's just not no act of affiliation, but as the  
3 evidence in this case suggested, where Mervyn Field, the  
4 leading pollster in California testified before trial that  
5 his polls at that point suggested 30 percent of registered  
6 Republicans would cross over. It's just that -- it's not  
7 just the lack of affiliation. These are actually voters  
8 who have signed the registration in another party.

9           QUESTION: Mr. Waters, maybe I misunderstood the  
10 Tashjian case, but I thought that the Republican position  
11 there was, we are not claiming that these Independents  
12 that we want to open our primary to are affiliating with  
13 our party. We just want to appeal to them and extend our  
14 audience to people that we know consider themselves  
15 Independent. I thought that was the argument that was  
16 made, not that they were in effect making an affiliation  
17 with the Republican Party.

18           MR. WATERS: Well, that's exactly right, Justice  
19 Ginsburg, and I think that's what makes Tashjian a much  
20 more difficult case from my side of the aisle than this  
21 case. I mean, Tashjian was a right-of-association case,  
22 that it was indeed a case where the Republican Party  
23 wanted to open up and invite Independents to join in.

24           QUESTION: But I -- as I understand your  
25 position to be, the party can make its own decision about

1 what affiliation is sufficient, or whether it requires an  
2 affiliation, and the party in Tashjian made one decision.  
3 The parties here want to make a different one and, under  
4 the First Amendment, they have that choice.

5 MR. WATERS: That's correct. Tashjian --

6 QUESTION: Do I misunderstand you?

7 MR. WATERS: Tashjian -- Tashjian is a  
8 slightly -- I think there's two theories here. Tashjian,  
9 if I could just speak colloquially, I think represents to  
10 people who practice in this field as a party sovereignty  
11 case. It essentially -- what it's distilled down to is  
12 that Tashjian stands for the proposition that parties have  
13 at least some rights to structure their own rules.

14 QUESTION: Well, do you agree with that?

15 MR. WATERS: I do, indeed. I do, indeed, but  
16 what I'm saying -- I agree. Yes, I do agree with  
17 Tashjian, and I think that what we're dealing with here is  
18 a weighing test, that -- and -- under Timmons, as this  
19 Court said, but under a weighing test the political  
20 association rights of parties have to be tested by what  
21 the real consequences are.

22 QUESTION: So if the State required the Tashjian  
23 result, you would say that's unconstitutional?

24 MR. WATERS: I think one could very easily say  
25 that that's unconstitutional, Your Honor --

1                   QUESTION: I mean --

2                   MR. WATERS: -- and then this Court would have  
3 to, or a court would have to go through the weighing  
4 process, but I mean, my point with Tashjian is, I think  
5 that the -- one -- the first element I think that under  
6 this Court's test that you have to measure is, is there a  
7 severe burden on the party's associational rights?

8                   Whatever one can say about Tashjian, I think  
9 here, where every California voter, 15 million of them are  
10 invited to vote in every party's primary in each race with  
11 absolutely no right of affiliation, that is a very  
12 significant and, in fact, severe infringement on party  
13 rights.

14                  QUESTION: Mr. Waters, are you -- suppose the  
15 Court were to agree with your position, are you seeking  
16 any kind of retroactive relief here? Presumably the  
17 recent elections were conducted under this scheme that  
18 you're challenging.

19                  MR. WATERS: We're -- the answer's no, we're not  
20 seeking any kind of retroactive relief here, and we  
21 haven't asked for any in the complaint. This was filed  
22 almost within 5 months after the election where this --  
23 where Proposition 198 was adopted.

24                  There have been a number of races under this,  
25 and it is now clear that in a handful of them, and

1       actually we don't know how many, that the blanket primary  
2       has changed the results of elections, but --

3            QUESTION: Did --

4            MR. WATERS: -- this case itself will have no  
5       direct effect on those cases.

6            QUESTION: Did you make any argument that this  
7       is so confusing that it's detrimental to the party? Let  
8       me ask you this: there were some 22 or 23 different names  
9       listed in the presidential column in the recent primary?

10          MR. WATERS: I think the argument we made is  
11       just -- one of the arguments we made was the dilution of  
12       the ballot label, which might slough over to that, but I  
13       have to admit, Justice Kennedy, is that it did not dawn on  
14       me when I did the trial that there would be 23 names on  
15       the presidential primary ballot. There were 23  
16       contestants --

17          QUESTION: How is the order of the names  
18       selected?

19          MR. WATERS: It's randomized. Under California  
20       statute it's not by party, not by alphabetical order.  
21       There's a randomization --

22          QUESTION: So you can find a Libertarian, a  
23       Democrat, a Republican, and 10 spaces further down you can  
24       find another Republican, and 15 spaces further down you  
25       can find a --

1                   MR. WATERS: Any conceivable pattern is  
2 possible, because it's totally random under statute.

3                   QUESTION: But you haven't argued that this  
4 confusion dilutes the party effectiveness?

5                   MR. WATERS: Well, I would focus on the dilution  
6 more than the confusion, but I think that obviously one  
7 deliberate aspect of Proposition 198 was to invite people  
8 to cross over in each race and vote in other parties'  
9 primaries. The record here is --

10                  QUESTION: May I ask something that I don't  
11 understand as a matter of fact? Say I'm looking under  
12 U.S. Representative on the 2000 ballot and it lists two  
13 Republicans, how are those candidates selected, the ones  
14 that do appear?

15                  MR. WATERS: The ones who are on the --

16                  QUESTION: Yes.

17                  MR. WATERS: -- 2000 ballot for a partisan  
18 office?

19                  QUESTION: Yes.

20                  MR. WATERS: They are -- they're self-selected.  
21 The parties have no ability in California to vet the  
22 candidates who choose to run their primaries.

23                  What happens is, let's take a Republican  
24 example. If -- let's just assume that I'm registered  
25 Republican. I want to run for Congress as a Republican.

1 I have to be a registered Republican, and I have to not  
2 have been registered in any other party 12 months -- well,  
3 actually, 24 months before the general election.

4 Then I take out nomination papers, and the  
5 number that comes to mind is -- I pay a fee, and I have  
6 get, I believe 40 to 60 signatures. I could be wrong  
7 about that, and then I will appear --

8 QUESTION: Must those signatures be all  
9 Republicans?

10 MR. WATERS: They would be --

11 QUESTION: In other words, when you petition to  
12 get on the ballot as a Republican, do the people that have  
13 to support you, could they be Democrats? Could they be  
14 Independents?

15 MR. WATERS: I believe the answer to that is  
16 that they have to be members of the party whose nomination  
17 you are seeking.

18 QUESTION: If that's the case, then, do you --  
19 you agree, I take it, that given in the West there is a  
20 tradition of nonpartisan elections, so I guess the State  
21 could say, we're going to have a nonpartisan gubernatorial  
22 election. Anybody can run, top two run-off. You agree  
23 with that?

24 MR. WATERS: I do not see any constitutional  
25 limitation --

1                   QUESTION: All right. If that's so, then,  
2 picking up with what Justice Ginsburg said, why couldn't  
3 they say, that's the system we want, with one  
4 qualification. We want the run-off to be between whoever  
5 calls himself a Republican and gets the most votes, versus  
6 whoever calls himself a Democrat and gets the most votes.  
7 That's our system. Now, we're not trying to strengthen  
8 the parties or weaken them. They're out of it. That's  
9 our system for selecting the Governor.

10                  MR. WATERS: I think the use of the party label  
11 in that situation creates constitutional issues. I think  
12 that --

13                  QUESTION: Because?

14                  MR. WATERS: Because -- I think the question  
15 there -- and I guess you're hypothesizing a Louisiana  
16 situation, as --

17                  QUESTION: Well, I'm hypothesizing what could be  
18 California. I mean, we're going to have the top person  
19 who calls himself a Republican run off against the top  
20 person who calls himself a Democrat.

21                  MR. WATERS: I think if the system is structured  
22 so that the public perceives them as nominees of the  
23 parties whose labels they are using, I think there is a  
24 constitutional issue there.

25                  QUESTION: So wouldn't the public begin to

1 understand it after it was used once?

2 MR. WATERS: I think --

3 QUESTION: And then you all said, you know, this  
4 isn't really a Republican. It's just somebody out there  
5 who calls himself one, or a Democrat.

6 MR. WATERS: I think -- I think that's an  
7 empirical question and I can't answer it right now, but I  
8 really think -- I guess my general answer to that line of  
9 questioning is that I have no doubt that California,  
10 although none of the parties before you prefer it, I don't  
11 think there's any constitutional problem with California  
12 or any State adopting nonpartisan primary elections. I  
13 mean, I just don't see it.

14 But having said that, once the party names come  
15 into the mix it changes things, and I think in California  
16 it is clearly true that the public didn't want to adopt a  
17 nonpartisan system. It wasn't presented to them, and I  
18 think as a reality, and this is an empirical question, the  
19 people actually take very seriously voting for a Democrat  
20 or a Republican, or somebody else.

21 QUESTION: What about a nonpartisan general  
22 election? Could the State say, you know, we're just going  
23 to have a -- we don't want any party identifications for  
24 the candidates for the general election?

25 MR. WATERS: I believe a State could

1 constitutionally do that, Your Honor, and I believe -- I'm  
2 not sure -- I mean, there's 50 States, and one thing I've  
3 learned through this, that there are essentially 50  
4 different variations of systems.

5                 But I believe that Nebraska -- I'm not sure that  
6 Nebraska uses labels on the general election ballot for  
7 its legislative offices, but in any event I believe that  
8 that would be constitutional, Your Honor, and it would be  
9 constitutional from our way of looking at it because the  
10 parties would not be in a position of having their name  
11 used by people who are in fact not supported by the  
12 members of the individual parties. In that system, I'm  
13 sure that the parties would get their favorite candidates  
14 on somehow, and they would run outside of the system.

15                 QUESTION: Your case should be brought under the  
16 Lanham Act, then.

17                 (Laughter.)

18                 QUESTION: Well, why isn't that true in this  
19 case? Can't the parties, by pre-election endorsements, or  
20 pre-election criticism or disavowals, make their party  
21 position known?

22                 MR. WATERS: Well, two answers to that. First,  
23 the most significant endorsement is the nomination itself.  
24 I mean, the parties are coerced here to put the nomination  
25 on candidates who will appear on the ballot as

1 Libertarian. It is indeed true that, due to a  
2 constitutional decision coming out of this Court, that  
3 parties can endorse whomever they like, but it would put  
4 the Libertarian in the party in the situation of having  
5 their own candidate, a Libertarian-anointed candidate on  
6 the ballot held out to the public as their representative,  
7 and then trying to get somebody else on.

8 Now, trying to get somebody else on, let me just  
9 say that the parties cannot get nominees on the ballot any  
10 other way. I mean, there is no --

11 QUESTION: Well, it would be their choice. If  
12 there were two people that were qualified Libertarian,  
13 then the Libertarian Party wouldn't have to choose, but if  
14 there were one that really did not, in the party's view,  
15 represent the values and the programs of the party, then  
16 the party could say so.

17 MR. WATERS: The party -- in the --

18 QUESTION: In advance. Could say, we --

19 MR. WATERS: During the primary elections,  
20 certainly, the party could say that, yes.

21 QUESTION: Why doesn't that cure the problem  
22 that you're concerned with?

23 MR. WATERS: Because the problem with that is  
24 the universe of voters who are going to choose that  
25 nominee are not the Libertarian electorate. It's the

1 entire -- it is 15 million voters in the State of  
2 California.

3           QUESTION: But at least you can make known to  
4 the voters that you, the Libertarian Party in the  
5 hypothetical case, prefer this particular candidate.

6           MR. WATERS: That is indeed true. I do not deny  
7 that, but I don't think that conforms with the  
8 Constitution, which this Court has said allows parties to  
9 choose standard-bearers of their own choice. I mean,  
10 despite -- even though the endorsement process could go on  
11 there, the candidate, the winner of that race would not be  
12 chosen by members of the Libertarian Party, and the  
13 Libertarian Party I think is a very good example to  
14 discuss here, because they are a very small party.

15           They -- I mean, they do not have the  
16 wherewithal -- I mean, if there's some kind of empirical  
17 justification required here, the Libertarian Party does  
18 not have the wherewithal to go out to 15 million voters in  
19 California and buy air time and say, Joe's a good  
20 Libertarian and Ed isn't.

21           QUESTION: You think that interest is so strong  
22 that it warrants throwing out -- I mean, if it's valid as  
23 to the Republicans and Democrats, is it invalid as a whole  
24 because of the Libertarians? Is there some way of  
25 splitting it? I didn't see how.

1                   MR. WATERS: No, I -- I'm not aware of a way to  
2 split it, Your Honor. I think it is -- I think the  
3 Libertarians are a particularly dramatic example of what  
4 can happen, but I think each party in California is in the  
5 same position with Proposition 198.

6                   QUESTION: Does the record show whether there's  
7 significant cross-over voting, or voting by members of a  
8 different party, for the minor parties like Libertarians?  
9 I would assume most people who vote for a Libertarian  
10 candidate would be Libertarians. I mean, do the Democrats  
11 try and jimmy up the libertarian nominee?

12                  MR. WATERS: Before this case, I would have made  
13 the same assumption, Justice Stevens, and what the record  
14 shows is that there was an expert report provided by  
15 Richard Winger who, on the basis of historical voting  
16 patterns in California, he -- at trial he testified that  
17 he believed in minor party primaries that the number of  
18 voters from outside the party would out-number the number  
19 of voters from inside the party.

20                  Now, there are two lodgings before this Court  
21 which are not in the record, let me make that clear, but  
22 there are results from the 1998-2000 election, and in the  
23 1998 election, an incident, three incidents which are in  
24 our opening brief, there are three incidents where -- and  
25 in Libertarian primaries I think their Assembly races, the

1       number of voters voting in those races was actually about  
2       two-and-a-half times the number of registered Libertarians  
3       in those districts.

4                 Now, I don't know how many of the Libertarians  
5       actually voted, but my point is that the ratio is actually  
6       two-and-a-half to one, at the very least two and a half --  
7       the two-and-a-half being people who are not registered  
8       Libertarians nominating those Libertarian voters.

9                 So I mean, one question Your Honor might ask is,  
10      why does that happen? I mean, we could all speculate  
11      about it, but there's --

12                 QUESTION: Does it indicate, for example, the  
13       particularly well-known Libertarian -- I mean, Michael  
14       Jordan running on the Libertarian ticket, or something  
15       like that?

16                 MR. WATERS: I think -- none of them were  
17       particularly well-known, Your Honor, but I think the fact  
18       of the matter -- what the Libertarians testified about at  
19       trial is, if they have the only female nominee in a race  
20       where there are eight males, some percentage of the  
21       electorate will vote for the female. If they have the  
22       only Hispanic nominee with an Hispanic name in a race  
23       where they're the only Hispanic, then there will be this  
24       flooding effect, so --

25                 QUESTION: Mr. Waters --

1 MR. WATERS: Yes, ma'am.

2 QUESTION: Does the party have the choice of  
3 opting out of this whole system, picking its candidate  
4 whatever way it likes, and then petitioning to put that  
5 candidate on the ballot for the general election?

6 MR. WATERS: No, it does not, Your Honor.

7 California law dating back from 19 -- well, before 1908,  
8 the whole goal of California law was to bring the parties  
9 within the system to democratize them. The only way that  
10 a party could go off the ballot, it would be to -- take  
11 the Democratic Party. The only way it would get off the  
12 ballot is if no State-wide candidate got more than  
13 2 percent of the vote at the previous election, and their  
14 registration fell below 1 percent of the total  
15 registration in the State, but there's absolutely no way  
16 that a political party itself, volitionally, can check out  
17 of the primary process.

18 QUESTION: So it has to be --

19 MR. WATERS: The whole process is there to bring  
20 them in. I mean, that's the whole structure.

21 I'd like to --

22 QUESTION: I guess we upheld the right of a  
23 State to direct that primary -- parties have to have a  
24 primary election rather than a caucus to select  
25 candidates. I mean, that's a concept we've accepted,

1           apparently.

2           MR. WATERS: I believe, reading this Court's  
3           opinions, that yes, indeed, you have.

4           QUESTION: And yet that's a tremendously  
5           intrusive burden on a political party's rights as well,  
6           isn't it?

7           MR. WATERS: We agree with that, Your Honor. We  
8           agree that in the -- California, the United States is  
9           distinctive, and that there are many significant  
10          intrusions on party associational rights. We think this  
11          case presents the question whether there is any limit to  
12          what the State can do vis-a-vis associational rights.

13          If I could, I would like to reserve any time I  
14          have left.

15          QUESTION: Very well, Mr. Waters.

16          MR. WATERS: Thank you.

17          QUESTION: Mr. Gede, we'll hear from you.

18           ORAL ARGUMENT OF THOMAS F. GEDE

19           ON BEHALF OF THE RESPONDENTS

20          MR. GEDE: Mr. Chief Justice, and may it please  
21          the Court:

22          After 30 years of declining voter turn-out in  
23          primary elections, California voters have acted to allow  
24          millions of additional voters to fully participate in the  
25          primary election, and the results have been dramatic, with

1       the highest voter turn-out in 16 years in the last  
2       gubernatorial primary, the highest in 20 years in this  
3       year's presidential primary. The voters acted in their  
4       own interest to increase that voter participation and  
5       turn-out, give them --

6            QUESTION: Is the fundamental assumption of the  
7       amendment that it's for the voters to tell the Republican  
8       Party or the Democratic Party what those parties should  
9       stand for?

10          MR. GEDE: No. The fundamental assumption is,  
11       the election belongs to the voters. It belongs to the  
12       individuals who are --

13          QUESTION: Well, I'm not sure how that's  
14       different from the postulate I suggested.

15          MR. GEDE: I'm not sure I understand --

16          QUESTION: Why isn't the theory of this law that  
17       it's for the voters to tell the Republican Party what it  
18       should stand for in the State of California?

19          MR. GEDE: Well, that is precisely what the open  
20       primary does. It allows the voters to decide in the  
21       primary election --

22          QUESTION: To decide the message of the  
23       particular party.

24          MR. GEDE: Well, Prop 198 is --

25          QUESTION: And I just wonder whether that's

1 valid. I mean, the very essence of the party's First  
2 Amendment right is to define its own message and send out  
3 its own candidate. It doesn't have to be more  
4 representative if it doesn't want to be, does it?

5 I mean, this is a remarkable proposition you're  
6 putting forward.

7 MR. GEDE: No, Your Honor. Justice O'Connor,  
8 what's remarkable here is that the voters decided to treat  
9 the primary election as an election. It is where they  
10 decide to vote on the candidates that go to office and  
11 represent them in the Statehouse, or the Governor --

12 QUESTION: Well, you could, have an open  
13 nonpartisan primary and decide that only the first five  
14 people on that nine -- nonpartisan primary will  
15 automatically go on the general election ballot, but  
16 that's not what you've done.

17 You haven't let the people select who are going  
18 to be the candidates among whom they will choose. You've  
19 let the people select who the Republican Party nominee is  
20 going to be and who the Democratic Party nominee is going  
21 to be, rather than letting Republicans select it and  
22 Democrats select it.

23 MR. GEDE: That's correct.

24 QUESTION: That's quite different.

25 MR. GEDE: That's correct, Justice Scalia. What

1 we're allowing voters to do is select their candidates for  
2 office. The nominees belong --

3                   QUESTION: No, not select their candidates.

4 You're allowing them to select the Republican Party's  
5 candidates, whether they're Republicans or not.

6                   MR. GEDE: The candidates carry --

7                   QUESTION: You could achieve what you're after  
8 if you're saying what we want to do is let the people  
9 select who the candidates for office should be. You could  
10 achieve that, not by forcing the Republicans to accept the  
11 candidate that the Republicans don't want. You could  
12 achieve it by simply having a nonpartisan primary. Let  
13 the voters select who the five most popular people are and  
14 they'll get on the ballot. Wouldn't that achieve the same  
15 thing as you're doing here?

16                  MR. GEDE: Certainly, Justice Scalia. If you  
17 have a nonpartisan ballot, it is a lesser burden on the  
18 parties than any other form of primary here, but in  
19 answering both Justice O'Connor and Justice Ginsburg, or  
20 Justice Ginsburg's questions about whether an open primary  
21 is any different than a blanket primary here, in reality  
22 what you're talking about is 23 States of the Union don't  
23 even have a requirement of voter affiliation. An  
24 individual voter can walk into the poll and say, I think  
25 I'll be a Republican today, or I think I'll be a Democrat

1 today.

2 There's no requirement, in most of these States  
3 that have open primaries, any differently than a blanket  
4 primary State to affiliate right on the spot and have some  
5 sort of act that says, I'm a Republican. The candidate  
6 carries the ballot.

7 QUESTION: Well, you have to be a Republican  
8 that day anyway, and you cannot vote for non-Republican  
9 candidates. By making that commitment, at least you're  
10 excluding yourself from voting for candidates for other  
11 parties, right, which is not the case in California.

12 MR. GEDE: That is correct.

13 QUESTION: You can determine the Republican  
14 Party nominee for one office and the Democratic Party  
15 nominee for another office.

16 MR. GEDE: That's correct, because it's as if  
17 each race is a separate --

18 QUESTION: Yes.

19 MR. GEDE: -- individual ballot.

20 QUESTION: So there is absolutely no commitment  
21 to a particular party, not even for the day.

22 MR. GEDE: That's correct, but --

23 QUESTION: Which there is in the other  
24 primaries.

25 MR. GEDE: Not in any open primary in which they

1       don't even have to indicate what their preference is or  
2       what their affiliation is.

3                 QUESTION: What is the State's interest in  
4       allowing an ever-changing galaxy of voters in a particular  
5       election to tell the party who its representatives must  
6       be, quite without respect to the voter's own party  
7       affiliation? What's the State's interest?

8                 MR. GEDE: The State's interest is what the  
9       voters themselves expressed they wanted. A majority of  
10      voters, including the rank and file of the Republicans and  
11      Democrats, impressive majorities of Republicans and  
12      Democrats, and probably minor party voters as well, all  
13      said, we want greater choice on the ballot. We want  
14      greater turn-out. 1.5 million Independent voters now have  
15      the opportunity to vote in the primary election. It's --  
16      it necessarily increases the base and the appeal --

17                 QUESTION: Well, that seems to me almost  
18      circular. You're saying that it's constitutional because  
19      the voters want it, but that's not usually an adequate  
20      description of a State interest when the State is  
21      regulating or interfering or restricting associational  
22      rights.

23                 MR. GEDE: I'm sorry if I misstated --

24                 QUESTION: Just because all the people want to  
25      restrict associational rights, that seems to me an

1       insufficient State interest.

2                   MR. GEDE: The interest is, indeed, compelling.  
3       the interest is to provide a broader base for the  
4       candidates to appeal to. The voters get greater choice.  
5       They bring in 1.5 million additional, independent voters.  
6       They get more competitive elections as a result. There's  
7       a greater representativeness among those candidates in the  
8       elected officials and, in answering Justice O'Connor's  
9       question, that is not saying on any basis of ideology or  
10      viewpoint. It's simply -- it's just civics. The more  
11      people you have voting, the more representative the  
12      candidates are going to be.

13                  QUESTION: Although your criterion may not be an  
14      ideological criterion, my understanding, and you tell me  
15      if I'm wrong, is that the virtues that you extol are  
16      inseparable from a feature that seems to go with the  
17      system, and that is, more centrist candidates, so that it  
18      seems to me inseparable from what you claim are its  
19      virtues, that there is a change in content of the  
20      political message of the people who are being selected.

21                  MR. GEDE: No, Justice Souter, I don't believe  
22      that's correct. The voters knew instinctively that  
23      bringing in more voters, including all of the Independents  
24      in California, the fastest-growing bloc of voters, was  
25      that they were going to get candidates that were more

1 representative of their points of view. That doesn't  
2 necessarily mean that it pulls it to the middle.

3 What's --

4           QUESTION: That's --

5           MR. GEDE: What's --

6           QUESTION: Regardless of where it pulls it, it  
7 pulls it in the direction of, in effect, an imposed  
8 content modification.

9           MR. GEDE: No, Your Honor, I disagree. There's  
10 no content to this at all. What's representative in San  
11 Francisco is not going to be what's representative in  
12 Orange County. It simply means that more voters that get  
13 to --

14           QUESTION: Well, I'm not suggesting that there's  
15 anything in the statute that determines what the content  
16 will be.

17           MR. GEDE: That's right.

18           QUESTION: But the statute, it seems to me, is  
19 inseparable from a regime in which the popular choice of  
20 voters will determine the content of the message  
21 attributed to a given political party.

22           MR. GEDE: I don't think that's right, Justice  
23 Souter. I think all the more that's happening is  
24 Independent voters, and voters are stepping forward and  
25 indicating their choice for the office. The political

1 parties are not private, autonomous organizations.

2                   QUESTION: Well, why not? I mean, what about  
3 the party that does not want to be representative? It  
4 thinks the country's going in the wrong direction. It  
5 knows the majority wants to go that way, but it wants to  
6 send out a message, a clarion call to call the country  
7 back to the right road, and it wants to select a candidate  
8 who will do that, and your system says, ah no, we'll have  
9 massive participation, so the majority will come in and  
10 say, ah, we like the road we're going on. Is that what  
11 the democratic system is supposed to produce?

12                  MR. GEDE: Justice Scalia, there is nothing  
13 constitutionally suspect about the majority --  
14 majoritarian rule here. The greater number of voters --

15                  QUESTION: I don't mind majoritarian rule at the  
16 point of election, but at the point of campaigning, and of  
17 trying to persuade the people, you're saying you cannot  
18 even have a party candidate who wants to go in the wrong  
19 direction. The majority will decide what's the right  
20 direction.

21                  MR. GEDE: That's right. This is an election --

22                  QUESTION: We won't even debate about going in  
23 the other direction, because we'll be sure to select  
24 candidates who agree with the majority.

25                  MR. GEDE: Well, Justice Scalia, this is the

1 election that belongs to the voters in which the first  
2 cut, when candidates are narrowed, these candidates will  
3 be their elected representatives in the Statehouse, or for  
4 Governor.

5 QUESTION: Well, this is the precise time when  
6 the party ought to be able to make its own selection for  
7 the spokesperson to run in the general election, to  
8 articulate the stand and the views that the party wants  
9 the voters to have a chance to hear.

10 That's precisely the point at which the  
11 associational interest of the party is at its zenith, and  
12 for the State to come in and say no, you have to be more  
13 representative here, is simply to change the message, and  
14 I think if the -- do you acknowledge that the party has  
15 any associational right?

16 MR. GEDE: Absolutely.

17 QUESTION: You do?

18 MR. GEDE: Yes, Justice --

19 QUESTION: Protected by the First Amendment?

20 MR. GEDE: Yes, Justice O'Connor.

21 QUESTION: What's left, if this can stand?

22 MR. GEDE: What this Court has done in Timmons  
23 is established a balancing test that looks at those  
24 important and legitimate First Amendment interests of the  
25 political parties and balances them against the legitimate

1       interests of the State. In this case, it's the voters,  
2       the voters themselves.

3                 This isn't a classic case of the State trenching  
4       on --

5                 QUESTION: Well, tell me what would remain after  
6       your so-called balancing test of a party's right at all.

7                 MR. GEDE: It has the right to do just what  
8       Justice Kennedy suggested, call for and endorse before the  
9       primary or at any point whatsoever, an endorsement of the  
10      central committee, or whatever the current party  
11      leadership chooses to do, but the voters are themselves  
12      participating in the election process.

13                QUESTION: You mean you say the answer is to let  
14      the party tell the voters before the primary election  
15      which candidate they support?

16                MR. GEDE: Certainly. Under you -- this Court  
17      has already said the party is free to --

18                QUESTION: Oh, but normally parties use primary  
19      elections to let the registered voters in that party tell  
20      the party what candidate the party members select.

21                MR. GEDE: Well, in this case you have the  
22      voters themselves, many of whom are party members, many of  
23      whom are Independents who want the opportunity to  
24      participate in that narrowing process. The election in  
25      their view belongs to them. When they voted on Prop 198

1       they knew that closed primaries were not working in  
2       California. They were contributing to lower voter  
3       turnout, alienation, gridlock. They knew instinctively  
4       that --

5                   QUESTION: Acne, oh, all sorts of things.

6                   (Laughter.)

7                   MR. GEDE: Well, it was --

8                   QUESTION: Gridlock? I mean, God, the traffic  
9       problems in L.A. are attributable to this thing, too?

10                  (Laughter.)

11                  MR. GEDE: What they knew -- what they knew,  
12       Justice Scalia, was that it was contributing to excessive  
13       partisanship, and partisan strife, and that has  
14       contributed to alienation and has -- and it has resulted  
15       in 30 years of decreased participation in voter turn-out.

16                  QUESTION: But what if a party takes the  
17       position that we think legislative gridlock is good,  
18       because there are too many laws on the books already?  
19       Isn't that party going to be at least partially deterred  
20       by this system?

21                  MR. GEDE: I think this -- I think Prop 198, by  
22       making the elected representatives more representative of  
23       the voters in their district will mean that the -- that  
24       those who do go to the Statehouse are going to be clearly  
25       more accountable to the voters. The voters want their

1 elected officials to be accountable.

2                   QUESTION: I don't want to be representative,  
3 says this party. I do not want to be representative.  
4 They're all going in the wrong direction. What is that  
5 party supposed to do?

6                   MR. GEDE: Well, if it's --

7                   QUESTION: The State is saying, you will be  
8 representative, but I don't want to be representative. I  
9 want to get off in a new direction. You can't do it?

10                  MR. GEDE: Justice Scalia, I don't understand  
11 what is undemocratic about --

12                  QUESTION: It's very democratic. It's  
13 wonderfully democratic, but usually we let parties put up  
14 candidates, and we exercise the democratic rights in the  
15 election, but you're saying parties can't even put up  
16 candidates. We're going to extend democracy one step  
17 earlier and not even let any parties put up people whom  
18 the majority doesn't like. That doesn't -- you know,  
19 that's --

20                  MR. GEDE: Well --

21                  QUESTION: -- democracy carried to an extreme,  
22 to the tyranny of the majority.

23                  MR. GEDE: Justice Scalia, just -- Judge Levy  
24 below balanced the interest and looked at what kind of  
25 burdens are put on the political parties by any cross-

1 over voting and found those burdens not to be severe.

2                   He had expert testimony based on the solid  
3 experience in the State of Washington and the State of  
4 Alaska, political scientists and experts who came to the  
5 court and said, well, this is what the burden is, and the  
6 burden was found to be minor. The burden was found not to  
7 be significant to the degree that it was severe.

8                   QUESTION: What -- how -- what did they say the  
9 burden was, albeit they said it was minor?

10                  MR. GEDE: The principal burden that I think  
11 Judge Levy found was significant was that it would have a  
12 dampening effect on the disciplining by the party, the  
13 party officials, the party leadership, on those  
14 legislators who go off with a charter, with a more  
15 representative charter to, say, the Statehouse, and he  
16 said that that is a burden. It is significant. This is a  
17 balancing that this court has applied, but it is not a  
18 severe burden. It has a dampening effect.

19                  QUESTION: Well, is there any indication that  
20 the nominees that have emerged from this blanket primary  
21 are different from the nominees that would emerge if you  
22 had a closed party primary?

23                  MR. GEDE: I'm not sure I --

24                  QUESTION: The people who appear on this  
25 ballot --

1 MR. GEDE: Right.

2 QUESTION: Let's say, Republican, Democrat, is  
3 there any indication that they would have been -- that the  
4 winners would have been different if California still had  
5 the closed primary?

6 MR. GEDE: I don't know the answer to that  
7 question. There will be races that will be determined by  
8 cross-over vote, whether cross-over --

9 QUESTION: Wasn't the objective of having  
10 different candidates prevail in the primary the precise  
11 justification for this statute --

12 MR. GEDE: Yes.

13 QUESTION: -- for this constitutional amendment?

14 MR. GEDE: Yes. The voters expected and  
15 anticipated cross-over votes would make a difference.  
16 Independents and even people from the other party voting  
17 for a candidate at their first choice, they're voting for  
18 the candidate that they want.

19 QUESTION: The whole purpose was -- of the  
20 constitutional amendment is to nominate different people  
21 than would have been nominated otherwise.

22 MR. GEDE: Potentially. The court found that  
23 generally it only affected the margin of outcome, and not  
24 the outcome itself, but that shouldn't make any  
25 constitutional difference, because the voters are voting

1 for the candidates they want to go on to office, and the  
2 burden on the parties was not severe, and the interests  
3 here were compelling, getting more people to the polls.

4           Those ballots also have nonpartisan races,  
5 judicial confirmations, bond issues, all kinds of things  
6 on them. We have a solid and important and compelling  
7 interest in bringing more --

8           QUESTION: What is your response to what I'm now  
9 thinking of as the Lanham Act problem? That is, when they  
10 come to the final election they're labeled Republican, and  
11 Democrat, and that suggests that they're the candidates  
12 that the parties might support, and they aren't. They're  
13 just someone who happens to call himself a Republican who  
14 gets more votes than anyone else who calls himself a  
15 Republican, et cetera.

16           MR. GEDE: Justice Breyer, that's no different  
17 in a closed primary in California than under a blanket or  
18 an open. It's a self-selecting system. Anybody can run  
19 for office and say I'm a Republican and get their name on  
20 the ballot, and then it's up to the party, if the party --

21           QUESTION: All right. I see.

22           MR. GEDE: -- organization doesn't like that  
23 candidate --

24           QUESTION: I have one other question, a slightly  
25 different topic. I'd like to hear what you have to say

1 about what I think of as the Libertarian Party problem.

2 MR. GEDE: Sure.

3 QUESTION: I mean, perhaps it's just a side  
4 issue, but on the other hand it's important to them, so  
5 what -- they're saying that they, as I take it, can find  
6 themselves with a candidate for Governor who may just  
7 reflect random factors, nothing to do with the Libertarian  
8 philosophy. Do you know --

9 MR. GEDE: Certainly.

10 QUESTION: Have I said enough to point you --

11 MR. GEDE: Certainly.

12 QUESTION: -- at what I'm worried about? What  
13 are we supposed to do about that, because none of your  
14 compelling interests, et cetera, deal with the burden that  
15 it imposes upon them.

16 MR. GEDE: The burden is no different for them  
17 than it is for a major party. If their interest is in  
18 getting somebody elected to office, what burden is it for  
19 them -- this is an opportunity for them. They get more  
20 support. They have a platform for greater visibility.  
21 They have the opportunity to appeal to a broader  
22 constituency.

23 QUESTION: But as they see it, rather than, say,  
24 as you see it -- as they see it, as I understand it, they  
25 say, here we have a party that's committed to an ideal,

1 and if we can stay committed to it, we will, in fact,  
2 eventually persuade people. But we cannot stay committed  
3 to that ideal when, because of random considerations,  
4 basically, we find ourselves saddled with a gubernatorial  
5 candidate who may not even share that ideal, and all of  
6 the compelling reasons you've given really have nothing to  
7 do with us, say the small parties.

8 MR. GEDE: Justice Breyer, the small parties are  
9 getting the votes of people who sincerely want that  
10 candidate. If that candidate wins in the election as a  
11 nominee of the Libertarian Party, that candidate won  
12 precisely because that candidate attracted the votes to  
13 it, people who now, whether it's a marginal affiliation or  
14 not, decide, you know, I'm really a Libertarian when it  
15 comes to that office, and I want that candidate for  
16 office.

17 And so what's the burden there? It's neither a  
18 burden on their desire to expand their base and become --  
19 and eventually win, which is one of their goals, nor is it  
20 even a burden on their expressive rights, their  
21 willingness to -- their desire to get their message  
22 across.

23 If they're solely there for an expressive  
24 purpose, then why are they doing that at public expense on  
25 a public ballot? The elections are not solely for

1 expression. Ballots aren't for expression. They're  
2 to get people elected to office.

3 QUESTION: Right. We should just drive out all  
4 those parties that don't stand much of a chance. I mean,  
5 I don't know why you even let the 2-percent parties in.  
6 They're just there to try to disseminate their ideas.

7 MR. GEDE: Well, Justice Scalia, there's nothing  
8 wrong with that, either. I mean, clearly on both  
9 campaigns and in elections there are elements of  
10 expression and there are elements of, importantly, getting  
11 officials elected to office, but ballots --

12 QUESTION: Mr. Gede --

13 MR. GEDE: Yes, sir.

14 QUESTION: -- what do you do with Tashjian?

15 Bear in mind, I dissented in Tashjian because I thought  
16 the State could tell a party, without affecting its  
17 associational interests, you have to have a closed  
18 primary, but if that is unconstitutional, as we said,  
19 because that somehow interferes too much with a party's  
20 associational rights, how could it possibly not interfere  
21 even more with a party's associational rights to say, you  
22 cannot have a closed primary?

23 MR. GEDE: Because, Justice Scalia, this case is  
24 not like Tashjian. There, one party was in power and  
25 actually ganged up on another power, and your powerful

1 dissent went to the State's power to protect the party in  
2 that particular situation.

3 This isn't that. This is where this -- the  
4 voters have decided they want to open up all of the --  
5 this is all of the parties, all of the voters, every  
6 demographic subgroup, majorities all across the board say,  
7 we want the chance to vote in our primary election, in the  
8 first cut of the election, for those who are going to go  
9 off and represent us, and --

10 QUESTION: And this case would be different if,  
11 in fact, a Democratic legislature had imposed exactly the  
12 same requirement over the objection of the Republicans but  
13 not the Democrats?

14 MR. GEDE: I think that would fall squarely  
15 under Tashjian and would be unconstitutional.

16 QUESTION: Tashjian doesn't say it looks to  
17 factors like that.

18 MR. GEDE: Well, it doesn't say it expressly,  
19 but if you look at Tashjian I think it -- it's -- what  
20 it's doing is, it's employing the same test --

21 QUESTION: You were so persuaded by my dissent  
22 you say that's the only conceivable explanation of the --

23 (Laughter.)

24 QUESTION: -- is that right?

25 MR. GEDE: It is a slightly different situation,

1 Justice Scalia, and this Court basically used the test  
2 that eventually emerged in Timmons. It derived from  
3 Burdick, it derived from Anderson v. Celebrezze, and you  
4 look to those burdens and see whether those burdens could  
5 be justified or outweighed by any State interest.

6                   QUESTION: I want to make sure I understand.  
7 The First Amendment operates differently if the statute is  
8 imposed by a legislature than by a referendum?

9                   MR. GEDE: No, I don't think that makes any  
10 difference here, but what is different here is that, where  
11 the voters acted in their own First Amendment interest you  
12 don't have the classic case of the State trenching upon  
13 the First Amendment rights of the party.

14                  You have the First Amendment interests of the  
15 voters competing with the First Amendment interests of the  
16 political parties, and when those two sets of First  
17 Amendment interests are in equipoise, as the NYU Brennan  
18 Center amicus brief put it, they really shouldn't be  
19 disturbed. They are First Amendment interests that are  
20 shared by all, and --

21                  QUESTION: Well, I had thought perhaps that  
22 Tashjian was a case where the justification fell in the  
23 legislature saying, we will tell you who really is the  
24 Republican Party, while here the legislature is saying,  
25 we're not so interested, frankly. We concede that this is

1       weakening the parties, and we're doing it for other  
2    reasons.

3                    MR. GEDE: Yes, Justice --

4                    QUESTION: You haven't accepted that, so I'm  
5    prepared to jettison my --

6                    (Laughter.)

7                    MR. GEDE: The voters here spoke to it, and  
8    the -- and --

9                    QUESTION: So you say the legislature doesn't  
10   represent the will of the people.

11                  MR. GEDE: No. The legislature --

12                  QUESTION: You say that as the Attorney General  
13   of the State of California, the legislature can't  
14   represent the will of the people?

15                  MR. GEDE: No. The legislature clearly can  
16   represent the will of the people, particularly when it is  
17   representative of their views.

18                  QUESTION: Yes, but you're telling me that the  
19   results should be different, depending on whether there's  
20   a legislative -- whether there's a statutory or  
21   constitutional amendment.

22                  MR. GEDE: No. I'm sorry if it came out wrong,  
23   but I believe that it should not make any constitutional  
24   difference whether this was passed by initiative or by the  
25   legis --

1                   QUESTION: So, then, all of the arguments in the  
2 briefs that the people of the State of California selected  
3 this are irrelevant?

4                   MR. GEDE: No, Your Honor. I thought the  
5 hypothetical was, if one party in power imposed a  
6 restriction on the other party --

7                   QUESTION: There's always one party in power. I  
8 don't know any legislature that isn't --

9                   MR. GEDE: Right.

10                  QUESTION: -- a majority of one party or  
11 majority of the other party, so if it gets to a  
12 legislature it's always going to have to be imposed by one  
13 party, I assume.

14                  MR. GEDE: Yes, Your Honor, but the hypothetical  
15 from Justice Breyer, if I understood it correctly, was  
16 that the restriction would be on just one party. In this  
17 case, it opens up and expands and permits all parties, all  
18 voters to participate in the primary election. It's not a  
19 burden on one party or the other. It is  
20 nondiscriminatory.

21                  QUESTION: Well, Tashjian was nondiscriminatory.  
22 It was imposed on all sides, right?

23                  MR. GEDE: Well, yes, Your Honor --

24                  QUESTION: But there you say it was imposed by  
25 one party, namely the party that controlled the

1 legislature, right?

2 MR. GEDE: Justice Scalia, the effect of the  
3 legislative decision in Tashjian was to hobble the other  
4 party. The other party wanted to expand its base of  
5 membership, it wanted to attract the Independents, and the  
6 party in power in the legislature was saying, you can't do  
7 that.

8 QUESTION: Couldn't the party that wants to  
9 expand, as you think these parties do, couldn't it conduct  
10 a public opinion poll? Is there any reason why the  
11 majority of citizens has to use the primary for that  
12 purpose?

13 MR. GEDE: Well, the primary, Justice Scalia,  
14 is, as this Court has said, an important first cut,  
15 integral part of the electoral process in which people  
16 elect their candidates to office, and they become  
17 Governor, and they become their legislative  
18 representatives, and they become their Members of  
19 Congress.

20 Why are we allowing the party tail to wag the  
21 dog? This is about elections, and this is about the  
22 voters having the right to elect the candidates for  
23 office.

24 QUESTION: But suppose the voters, or the  
25 legislature says, there are some parties that are so far

1 out we're just going to outlaw them? I mean, surely they  
2 couldn't do that.

3 MR. GEDE: Again, this Court has provided a --  
4 provided a construct in which to examine that in the test  
5 that it has in Timmons, and it may be that the State won't  
6 have compelling enough interests to overcome whatever  
7 burdens would be placed on parties in the --

8 QUESTION: Well, it's certainly a rather severe  
9 burden to be outlawed, I would think.

10 MR. GEDE: It may well be, and --

11 QUESTION: A fatal burden.

12 (Laughter.)

13 MR. GEDE: A court would look --

14 QUESTION: May I ask --

15 MR. GEDE: A court would look at that under the  
16 test that this Court has provided.

17 QUESTION: May I ask a stupid question? I'm  
18 trying to find out the source of the Constitution, you  
19 know, both sides, and Article I section 4 says that the  
20 times and places and manners of holding elections and so  
21 forth shall be prescribed in each State by the legislature  
22 thereof. Is it permissible for a ballot initiative like  
23 that to replace the legislature?

24 MR. GEDE: Yes. In California the initiative  
25 is -- the initiative power is a legislative power, and --

1           QUESTION: But the people who wanted --

2           MR. GEDE: -- the courts of --

3           QUESTION: -- are not the legislature, are they,  
4 within the meaning of that provision?

5           MR. GEDE: Well, I don't know the full answer to  
6 that question, if the legislature means the legislative  
7 power, or if it means the body in which the elected  
8 representatives sit. I don't have an answer beyond that.

9           QUESTION: Were the Framers aware of initiative  
10 and referenda?

11           MR. GEDE: No, of course, not, to my knowledge.  
12 I don't know that they were --

13           QUESTION: They weren't aware of political  
14 parties, either, I don't suppose.

15           MR. GEDE: That's correct, also. I mean, there  
16 were no political parties, and people came to the polls  
17 and elected the candidates they wanted for office.

18           In sum, if I may, if this Court were to accept  
19 the petitioner's argument that just allowing outsiders in  
20 were to severely burden the party to the degree that it's  
21 unconstitutional, this total party autonomy approach, it  
22 would in California, as Professor Eugene Lee has pointed  
23 out, decrease voter turn-out again, it would increase  
24 alienation with the parties and the party leadership,  
25 something that's already there, it would increase the

1       Independents getting a larger registration, and it frankly  
2       would weaken the two-party system.

3                  More importantly, as Justice O'Connor asked  
4       earlier, it would jeopardize all of the open primaries  
5       across the country, and primaries that allow same-day  
6       registration and States that don't even require  
7       recognition, or allow people to maintain their party  
8       affiliation in private. Ultimately, the thrust of that  
9       argument is down the slippery slope that even primaries  
10      themselves could not stand up against that argument of  
11      total party autonomy.

12                  Thank you, Your Honor.

13                  QUESTION: Thank you, Mr. Gede. Mr. Waters, you  
14      have 2 minutes remaining.

15                  MR. WATERS: Mr. Chief Justice, I have nothing  
16      to add to my previous argument. I'd be delighted to  
17      answer any questions from the Court.

18                  CHIEF JUSTICE REHNQUIST: The case is submitted.

19                  MR. WATERS: Thank you, Your Honor.

20                  (Whereupon, at 11:57 a.m., the case in the  
21      above-entitled matter was submitted.)

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## CERTIFICATION

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CALIFORNIA DEMOCRATIC PARTY, ET AL., Petitioners v. BILL JONES,  
SECRETARY OF STATE OF CALIFORNIA, ET AL.

CASE NO: 99-401

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BY Donna M. Federico

(REPORTER)