



1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----:  
3 DEMOCRATIC PARTY OF THE UNITED :  
4 STATES OF AMERICA, ET AL., :

5 Appellants, :

6 v. :

No. 79-1631

7 BRONSON C. LA FOLLETTE ET AL., :

8 Appellees. :  
9 -----:

10 Washington, D.C.

11 Monday, December 8, 1980

12 The above entitled matter came on for oral argument  
13 before the Supreme Court of the United States at  
14 11:51 o'clock a.m.

15 APPEARANCES:

16 RONALD E. EASTMAN, ESQ., Cadwalader, Wickersham &  
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19 114 East, State Capitol, Madison, Wisconsin 53702;  
on behalf of the Appellees

20 ROBERT H. FRIEBERT, ESQ., 710 North Plankinton Ave.,  
21 Milwaukee, Wisconsin 53203; on behalf of the  
22 Appellees  
23  
24  
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C O N T E N T S

ORAL ARGUMENT OF

PAGE

RONALD D. EASTMAN, ESQ.,  
on behalf of the Appellants

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BRONSON C. LA FOLLETTE, ESQ.,  
on behalf of the Appellees

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ROBERT H. FRIEBERT, ESQ.,  
on behalf of the Appellees

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear argument next in Democratic Party of the United States v. La Follette.

Mr. Eastman, I think you may proceed when you are ready.

ORAL ARGUMENT OF RONALD D. EASTMAN, ESQ.,

ON BEHALF OF THE APPELLANTS

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

The facts in the case, in this case, are relatively simple. Under the Wisconsin Primary Election Statute, a voter may vote in the presidential preference primary of any party he or she chooses without regard for the voter's affiliation or any declarations of support for the party. The Democratic Party, in contrast, has for years believed that only democrats should participate in this process of selecting its candidates. Over the years, since the party reform effort began in 1968, the party has developed a rule implementing that principle. The rule provides that only publicly declared democrats may participate in the processes of selecting the democratic nominee. And that is true whether those processes are a primary, a caucus or a convention system.

QUESTION: Mr. Eastman, I take it we have to deal here with the Article II, Section 1 provision, each state shall appoint in such manner as the legislature thereof shall direct



1 a number of electors equal to the whole number of senators and  
2 representatives to which the state may be entitled. What if  
3 the Wisconsin legislature had simply provided that 13 or 14  
4 people should be the electors to the electoral college in  
5 December, 1980, in Washington, in this particular election?

6 MR. EASTMAN: I think the -- I don't believe they  
7 could do that. But I believe the --

8 QUESTION: Well, why don't you believe they could do  
9 that?

10 MR. EASTMAN: Well I think, Mr. Justice Rehnquist,  
11 the question --

12 QUESTION: It's a --

13 MR. EASTMAN: -- the question is not who the electors  
14 would be in the electoral college; the question is, who will  
15 be the delegates to the Democratic National Convention. Now  
16 there's a slight difference of opinion, or at least, difference  
17 of emphasis between the two Appellees, as to what exactly is  
18 the state's authority to enact a statute regulating the pri-  
19 maries of major political parties; that is, that the process  
20 by which the delegates for the national convention are chosen.  
21 But it may not be Article II.

22 QUESTION: The statute speaks in terms of appoint,  
23 not regulate the selection of -- well, what if the state just  
24 decided to dispense with any sort of intervening elections or  
25 caucuses or anything else and said, we hereby appoint John Doe,

1 Richard Roe, et cetera, as Wisconsin's elector to the electoral  
2 college in December, 1980?

3 MR. EASTMAN: Well I had a sense that there are a  
4 number of decisions of this Court that would probably preclude  
5 that. It might well be a denial of the federal right to vote --

6 QUESTION: Well as far as the Constitution goes, the  
7 state could do precisely that, couldn't it?

8 MR. EASTMAN: I think as far as the Constitution's  
9 literal language, that's correct, Mr. Justice Stewart.

10 QUESTION: And just sort of be completely oblivious  
11 to the Republican and Democratic conventions and to their  
12 nominees.

13 MR. EASTMAN: That might be possible, Mr. Justice  
14 Stewart. I don't think --

15 QUESTION: As far as the Constitution goes.

16 MR. EASTMAN: That's correct.

17 QUESTION: Because the state hasn't done anything  
18 like that, has it?

19 MR. EASTMAN: Well I think that's correct, absolutely.  
20 It's not the case here. The fact of the matter is the state  
21 has enacted primary election statutes and whether it has done  
22 so pursuant to its Article II power or whether its enactment of  
23 primary statutes is pursuant to some other power, the fact  
24 of the matter is now that it's legislated, it can only act  
25 within the confines of the Bill of Rights.

1 QUESTION: But for purposes of your case you can  
2 concede that the state could do what Mr. Justice Rehnquist  
3 has suggsted. But that they haven't tried that route.

4 MR. EASTMAN: I thought I did, Mr. Chief Justice.  
5 But I would be reluctant, almost as an academic matter, to con-  
6 cede that. But it's not relevant, I mean, that's the point I  
7 was trying to make, the fact of the matter is the state has  
8 enacted primary election statutes. The Supreme Court of  
9 Wisconsin has interpreted those primary election statutes, that  
10 primary election statute, as precluding the democratic party  
11 from seating delegates, any delegates other than those who  
12 comply with the primary election statute. So yes, I could  
13 concede that it's simply not an issue.

14 QUESTION: But certainly an act of the Wisconsin  
15 legislature that just named certain electors would likewise  
16 have all the objections to which you pose to the Wisconsin open  
17 primary law, would it not?

18 MR. EASTMAN: I don't think it would, Mr. Justice  
19 Rehnquist, because it wouldn't be dictating to the democratic  
20 party how it conducted its convention and which delegates it  
21 selected. It may raise other issues and other problems,  
22 but it wouldn't raise the issues in this case.

23 QUESTION: It would be dictating to both parties,  
24 it would be dictating to both parties, in effect.

25 MR. EASTMAN: It wouldn't be dictating how they

1 selected their nominees because as far as Wisconsin's nominees  
2 were selected -- as far as the state of Wisconsin was con-  
3 cerned the nomination of the major parties would be irrelevant,  
4 under your hypothesis.

5 QUESTION: Mr. Eastman, how many states do you know  
6 have open primaries today?

7 MR. EASTMAN: There are only two, Mr. Justice Black-  
8 mun; the state of Wisconsin and the state of Michigan. Now  
9 the state of Montana has come before the Court as an amicus and  
10 claimed that it has an open primary. I must say I don't read  
11 the statute that way, and they cited no authority that indi-  
12 cated that they do have an open primary. They have an open  
13 primary but it's not binding on the delegates. And because of  
14 that, it's really not -- that the primary statute wouldn't be  
15 affected by this case.

16 QUESTION: Well does your proposal -- what does your  
17 proposal involve; someone declares his party affiliation as he  
18 comes into the polling place, is that sufficient?

19 MR. EASTMAN: That's sufficient under the national  
20 rule. The national rule, Rule 2(a), requires a public declara-  
21 tion of affiliation.

22 QUESTION: And then what do you do, hand him a  
23 democratic ballot, or a republican whatever-it-is that he  
24 declares?

25 MR. EASTMAN: The details of voting are left to the



1 state party and to state law, and it varies from state to state.  
2 In some states, the voter is handed a democratic ballot; in some  
3 states, he goes into the voting booth and makes his selection  
4 after having declared, after he made the declaration outside  
5 the voting booth.

6 QUESTION: So that he can't cross over in the --

7 MR. EASTMAN: No.

8 QUESTION: If it's machine voting, he might cross  
9 over after he gets into the cubicle.

10 MR. EASTMAN: No. The state party would have to make  
11 arrangements to ensure that he had made his declaration and  
12 voted --

13 QUESTION: And then --such as separate voting mach-  
14 ines for each party?

15 MR. EASTMAN: Separate voting machines or blocking  
16 off the republican and independent lines, or whatever third  
17 party --

18 QUESTION: As each voter comes in?

19 MR. EASTMAN: That's correct. But again, the details  
20 of implementing the party rule are not dictated by the national  
21 party, those are left to the state --

22 QUESTION: No, but you're making substantial detail.  
23 I've lived through a couple of these things; my home state used  
24 to have an open primary. I'm suprised you didn't name it. I  
25 thought they still did, but maybe not. And, both machines and

1 otherwise. And it's a lot simpler with an open primary than it  
2 is with a closed one.

3 MR. EASTMAN: It's simpler, but there are numerous  
4 states that have closed primaries. 29 states and the District  
5 of Columbia have closed primaries and --

6 QUESTION: Well that's on the theory that the primary  
7 is a substitute for the party convention, historically, is it  
8 not?

9 MR. EASTMAN: I think that's generally the correct  
10 history --

11 QUESTION: Quasi-private or quasi-public. It isn't  
12 like an election in that sense.

13 MR. EASTMAN: That's correct, Mr. Chief Justice. The  
14 end of the exercise is not the election of a public official,  
15 the end of the exercise is the selection of delegates to a  
16 national convention who are committed to vote for particular  
17 nominees.

18 QUESTION: Mr. Eastman, do you contend the Wisconsin  
19 statute is unconstitutional, or merely that the national party  
20 need not seat delegates selected pursuant to the Wisconsin  
21 statute?

22 MR. EASTMAN: Mr. Justice Stevens, I think the latter  
23 is closer to our position. In other words, --

24 QUESTION: That's what I understand it to be, and if  
25 so, is it a proper appeal?

1 MR. EASTMAN: I think it's a proper appeal because the  
2 Wisconsin statute, as applied by the Wisconsin Supreme Court  
3 and, I think, the Wisconsin Supreme Court's order was faithful  
4 to the statute's requirements, not an opinion, but the order.

5 QUESTION: I see.

6 MR. EASTMAN: I think that the statute as applied to the  
7 Democratic party is unconstitutional.

8 MR. CHIEF JUSTICE BURGER: We will resume there at  
9 1:00 o'clock, counsel.

10 (Lunch recess)

11 MR. CHIEF JUSTICE BURGER: Counsel, you may continue.

12 MR. EASTMAN: Mr. Chief Justice, and members of the  
13 Court:

14 The order of the Wisconsin Court effectively requires  
15 the party to seek delegates chosen in accordance with the  
16 open primary statute and in conflict with the party's  
17 determination about who ought to participate in this process.  
18 This is not a case, this is not a case where the statute, where  
19 the Wisconsin statute or the Court's order says to the party,  
20 if you want to use our electoral machinery, our election mach-  
21 inery, you must permit -- you must permit non-Democrats to  
22 participate in the primary process.

23 There is a case instead where the state is attempting  
24 to dictate to the party and to the party's convention which  
25 delegates it has to seat.

1 QUESTION: What do you think the Supreme Court of  
2 Wisconsin would have done had the national party failed to  
3 comply? Would they have held the people in contempt?

4 MR. EASTMAN: I believe so. The Wisconsin court order  
5 actually was a declaration. The Attorney General of Wisconsin  
6 had already taken steps to obtain an injunction in New York  
7 where the convention was held, had that been necessary. So yes,  
8 I think they would have probably held -- the national party and  
9 the Democratic National Committee were respondents in the  
10 original action in the Wisconsin Supreme Court and I presume,  
11 would have been held in contempt had that -- had the democratic  
12 party violated the order.

13 QUESTION: Mr. Eastman, may I pursue that subject a  
14 moment? If this litigation had never been brought, I suppose  
15 the situation when the convention arrived would have been much  
16 as it was in fact, because the order was stayed, if I remember  
17 correctly.

18 MR. EASTMAN: That's correct.

19 QUESTION: And the National Committee went ahead and  
20 seated the delegates anyway.

21 MR. EASTMAN: It did so, Justice Stevens.

22 QUESTION: Does the National Committee really have  
23 much interest in the issue? I understand they want to be out,  
24 free of an order, compelling them to seat them. But supposing  
25 the litigation had never been brought, presumably they would have



1 just gone ahead and seated the delegates.

2 MR. EASTMAN: I don't think that's correct, Justice  
3 Stevens. Had the litigation never been brought, I believe  
4 that the National Party would have run an alternate delegate  
5 selection system, or, hopefully with the cooperation of the  
6 state party, and a different slate of delegates would have been  
7 seated. The National Party, at the time the stay was issued  
8 was unfortunately and regrettably not in a position to run an  
9 alternate delegate selection system, partly because there wasn't  
10 sufficient time and partly because the DNC didn't have the  
11 resources to do it.

12 QUESTION: Right, yes. You don't contend that there's  
13 anything unconstitutional about the Wisconsin statute, do you?

14 MR. EASTMAN: It's -- we contend that the Wisconsin  
15 statute is unconstitutional --

16 QUESTION: Well, if you're ordered to comply with it,  
17 suppose -- if you're ordered to comply with it, now we covered  
18 that before lunch, that's unconstitutional under your view.  
19 But supposing they just have a statute, say well we're going  
20 to elect people in this fashion and the National Committee can  
21 take our delegates or leave them, as it chooses.

22 MR. EASTMAN: There would be nothing unconstitutional  
23 about that sort of statute.

24 QUESTION: Well why -- tell me why the case isn't  
25 moot, then? I thought your claim was that you wanted to be --

1 the party wanted to be free from this kind of a statute. Or  
2 from this state effort to throw primaries open to possible  
3 members of the other party.

4 MR. EASTMAN: The case is not moot, Justice White,  
5 because one, the Wisconsin order was not limited to the 1980  
6 convention; the order has continuing effect and would continue  
7 to require the Democratic Party in the 1984 convention to seek  
8 delegates selected in accordance with the open primary.

9 QUESTION: I see.

10 QUESTION: Where is the order, Mr. Eastman, do you  
11 know?

12 MR. EASTMAN: Sir?

13 QUESTION: Do you know where the order is, in the --

14 MR. EASTMAN: Yes, the order is in the appendix to  
15 the jurisdictional statement at page 42(a).

16 QUESTION: Thank you.

17 QUESTION: What color?

18 MR. EASTMAN: Blue, and thick; it's the thick blue.

19 QUESTION: 42(a)?

20 MR. EASTMAN: Yes.

21 QUESTION: But not over 30 pages.

22 MR. EASTMAN: It's the appendix to the jurisdictional  
23 statement.

24 QUESTION: Mr. Eastman, isn't it a little unseemly that  
25 the state party of your own party is on the other side of the

1 counsel table here?

2 MR. EASTMAN: As you know, the Democratic Party is  
3 not always of one mind on many of the issues that it confronts.

4 QUESTION: I suppose that's the only obvious answer  
5 you could give.

6 QUESTION: Not a monolith, in other words?

7 MR. EASTMAN: It is not a monolith, for good or for  
8 ill.

9 QUESTION: But it does demonstrate, that they are con-  
10 tent with the Wisconsin statute and system?

11 MR. EASTMAN: The state party is content with the  
12 system. The National Party, however, is a national ssocia-  
13 tion made up of the state parties of 50 states and recognized  
14 entities from other jurisdictions.

15 And that really goes, in a way, to the heart of the prob-  
16 lem in this case named in Cousins v. Wigoda, and that is that  
17 the National Party wishes to have national standards that apply  
18 to its processes for selecting a nominee. It has numerous  
19 standards.

20 QUESTION: Are they open to the risk that the National  
21 Convention might decline to seat the delegation that is so  
22 selected?

23 MR. EASTMAN: There is that risk, Mr. Chief Justice.  
24 And it has happened on occasion. But I assume you -- there is  
25 the risk that the National Convention might refuse to abide by

1 the rules that the National Party had set earlier for the se-  
2 lection of delegates. I assume that's your question, and indeed  
3 that happened in O'Brien v. Brown, in California. But that's a  
4 very rare case indeed. We don't anticipate it happening --

5 QUESTION: Wouldn't it be rare for delegates not  
6 to be seated?

7 MR. EASTMAN: It's rare for delegates not to be  
8 seated when the selection process otherwise complied with all  
9 the National Party's rules for selecting the delegates.

10 QUESTION: Well, if you're not attacking the statute  
11 on its face, so to speak, why isn't this case moot?

12 MR. EASTMAN: The case is not moot because the Wis-  
13 consin Court's order, which I think faithfully reflects the  
14 Wisconsin statute as applied to the Democratic party, continues  
15 to require the Democratic party to seat delegates from Wisconsin  
16 that are selected in part by non-Democrats.

17 QUESTION: Well it just says the presidential prefer-  
18 ence primary. To the democratic national -- you mean, that's  
19 all the primaries from here on in?

20 MR. EASTMAN: I interpret that as being generic and  
21 in any event, as I said, the order itself is consistent with  
22 the Wisconsin statute which requires the National --

23 QUESTION: I don't know why you don't -- I don't know  
24 why you back off from saying your claim is that the statute,  
25 that the open primary is unconstitutional.



1 MR. EASTMAN: I didn't -- if I appeared to back off  
2 it, I didn't mean to, Mr. Justice White. I think --

3 QUESTION: Well I thought you just said that except  
4 for this order there's nothing wrong with an open primary  
5 statute.

6 MR. EASTMAN: I hope I didn't say that. What I said  
7 was --

8 QUESTION: It was --

9 MR. EASTMAN: -- there's nothing wrong with an open  
10 primary statute as applied to another political party, spe-  
11 cifically, for example, the Republican party which has no objec-  
12 tion to a -- an open primary.

13 QUESTION: So you are saying this statute is unconsti-  
14 tutional in the face of a contrary party rule?

15 MR. EASTMAN: Exactly.

16 QUESTION: Well why can't the Democrats simply set  
17 up their own machinery for choosing delegates in Wisconsin and  
18 outside of the state system and in full compliance with the  
19 National Democratic standards and send them to the Democratic  
20 National committee, then?

21 MR. EASTMAN: Justice Rehnquist, the Wisconsin Court  
22 did not leave us that option. The Wisconsin Court, effectively  
23 directs the party to seat delegates selected in accordance with  
24 the open primary and not by some other process. Now the order  
25 stated as if it were a negative order, but the net effect of it

1 is that it requires the parties to seat and --

2 QUESTION: And you said the Wisconsin -- you say the  
3 Wisconsin Court has no jurisdiction whatever to tell the Demo-  
4 cratic party what standard should be followed for seating  
5 delegates to its convention?

6 QUESTION: Or, and the state has no power?

7 MR. EASTMAN: The state has no power, because when,  
8 if it tries to do so, it violates the parties' First and Four-  
9 teenth Amendment rights.

10 QUESTION: It's made the final order here, though.  
11 It's a court which has made the final order.

12 QUESTION: And yet you concede that the state legis-  
13 lature under the constitution can specify who the delegates to  
14 any -- to who the electors may be.

15 QUESTION: That's quite different.

16 MR. EASTMAN: I believe that's quite different,  
17 Justice Rehnquist. Even if the state had specified the  
18 electors, that does not mean that the state could nonetheless  
19 specify the delegates to the National Party's convention  
20 because even if Wisconsin chose that scheme, the National Party  
21 would still hold a convention to produce a nominee to run for  
22 president, president of the entire United States, and those  
23 delegates, the delegates from Wisconsin would still reflect  
24 a set of rules for selecting delegates that was inconsistent  
25 with the party's rule.

1 QUESTION: I think what your position must be, that  
2 the state of Wisconsin through its courts or legislature, has  
3 no more authority to tell the Democratic Party which delegates  
4 should be seated than it would with the Moose Lodge or the  
5 Knight's of Columbus?

6 MR. EASTMAN: That's correct, Mr. Chief Justice.

7 QUESTION: Well but are you saying that the Democratic  
8 National Committee's action in various aspects is not "state  
9 action"?

10 MR. EASTMAN: The question of whether and under  
11 what circumstances the Democratic parties' action -- state  
12 action is not presented by the case, Mr. Justice Rehnquist.

13 QUESTION: In answer to the Chief Justice's question,  
14 you say it's just like the Moose Lodge or the Knights of  
15 Columbus, which clearly are private organizations. Are you say-  
16 ing that the Democratic National Committee is a private organi-  
17 zation in the same sense?

18 MR. EASTMAN: I think it is a private organization  
19 but this case is much different from the Moose Lodge case. This  
20 is not a case where --

21 QUESTION: The point is that the state can't tell the  
22 Moose Lodge who to take as its members. And that's state  
23 action, and that was the Chief Justice's question.

24 MR. EASTMAN: That's correct, that's correct. Yes, I  
25 understand that, Justice Stewart. And that's what I'm saying

1 is that this is -- that's exactly -- that's our view.

2 QUESTION: And we had a case here in this Court, one  
3 of the parties to whom which was Moose Lodge, but that's quite  
4 different.

5 MR. EASTMAN: That's right.

6 QUESTION: The question there was whether the  
7 action of that organization was state action, that's quite a  
8 different question.

9 QUESTION: In all of this, I think you ought to put  
10 a little caveat and take a look at U.S. against Classic, when  
11 you say how private primaries are.

12 MR. EASTMAN: That's right, Justice Marshall. This  
13 is not a case --

14 QUESTION: They're always private.

15 MR. EASTMAN: That's right. This is not a case that  
16 involves the question whether the parties rules violate an  
17 individual's constitutional rights or whether the party is  
18 exercising some authority outside the confines of the Bill of  
19 Rights, that's a different case, it's not this one. The case  
20 here is what the state's power is with regard to the party,  
21 not what the party's is with regard to some individual.

22 QUESTION: Mr. Eastman, I think you -- excuse me.

23 QUESTION: If a party is a purely private organiza-  
24 tion, then there are an awful lot of constitutional provisions  
25 that don't apply to it and very few that do.



1 MR. EASTMAN: The question whether a National  
2 Political Party is purely a private institution is one that I  
3 do not think has to be answered here and it involves questions  
4 that this Court has not really answered in similar cases. The  
5 question whether the party is purely private or in some sense  
6 it exercises state action simply isn't presented, as it was  
7 not presented in Cousins v. Wigoda, and the Court and the concur-  
8 rence, the majority -- and the concurrence specifically noted  
9 that.

10 QUESTION: Mr. Eastman, I think you've answered a  
11 question I asked you in two different ways and I want to be  
12 sure I get your considered answer. I understand your argument  
13 that the Wisconsin Supreme Court may not compel the National  
14 Party to accept the delegates elected pursuant to an open  
15 primary. But assume that we vacated that judgment and just  
16 left the statute standing and then left the matter so that you  
17 could either take them or leave them, depending on your own  
18 rules. Would you then have any objection to the constitution-  
19 ality of the Wisconsin statute which says that if we're going  
20 to elect delegates we're going to do it with an open primary.

21 MR. EASTMAN: We would have no objection to a Wis-  
22 consin statute that did not bind the Democratic party to accept  
23 delegates selected --

24 QUESTION: So the statute is not unconstitutional  
25 on its face, but rather merely as applied to compelling

1 to accept their people?

2 MR. EASTMAN: Yes, Mr. Justice Stevens. I'd like to  
3 reserve the rest of my time for rebuttal.

4 MR. CHIEF JUSTICE BURGER: Very well. Mr. Attorney  
5 General.

6 ORAL ARGUMENT OF BRONSON C. LA FOLLETTE, ESQ.,

7 ON BEHALF OF APPELLEE, STATE OF WISCONSIN

8 MR. LA FOLLETTE: Mr. Chief Justice and members of  
9 the Court:

10 At the outset I want to make a correction on the  
11 factual circumstances concerning the Montana presidential pri-  
12 mary. This is contained in the amicus brief of the state of  
13 Montana and the state of Washington on page 3, I believe it is.  
14 There, the procedure for the Montana primary is set forth and  
15 under Montana law, each political party has the right to choose  
16 its method for selection of delegates and under that law in  
17 1980, the democratic party of Montana chose to select its  
18 delegates through the open primary. And as stated there, that's  
19 a policy which also violates the rules of the Democratic Na-  
20 tional Committee. So Wisconsin is not the only court -- excuse  
21 me, the only state that has -- is subject to the rule of -- in  
22 conflict with state law in this case.

23 I will address the impact of the party rule upon the  
24 state electoral and political process. Wisconsin voter surveys  
25 indicate that the largest class of party identifiers in Wisconsin

1 as well as in most states of the country identify themselves  
2 as political independents. At stake here is the impact of  
3 the rule upon independents, Republicans, minor party adherants  
4 and others who value their privacy. What are their rights  
5 under the party rule? There are absolutely none. On the  
6 other hand under the authority of Article II, Section 1, Wis-  
7 consin law recognizes and protects their rights to participate  
8 in the candidate selection process leading to the election of  
9 the highest office in the land. And it protects those rights  
10 to participate in a free and open manner without a declaration  
11 of party loyalty as a condition of exercising the basic right  
12 of all, which this Court has held to be the root of all  
13 basic rights, the right to vote.

14           What are the interests that the Wisconsin open  
15 primary serves? It's important to note that the direct primary,  
16 Wisconsin being the first state to enact such a law in 1905,  
17 was a reform effort to cleanse the political process, which up  
18 to that time had been dominated by special interests who con-  
19 trolled the selection of candidates through the political  
20 caucuses. These privacy interests are eloquently stated by  
21 the amicus brief of Washington and Montana, and the brief of  
22 Editor Maraniss, I won't go into them here. This interest  
23 broadly serves the expansion of the franchise, it encourages  
24 voting, and it works. Wisconsin has been in the top three of  
25 voter participation turnout in the presidential elections in

1 this past decade.

2 QUESTION: Primaries and general election, both?

3 MR. LA FOLLETTE: That is correct, Your Honor. No  
4 case thus far decided by this Court has struck down a law which  
5 expanded the franchise to too many people and there is no  
6 reasonable justification by the Appellant to do so now. Our  
7 system --

8 QUESTION: Mr. La Follette, could I ask you just one  
9 sort of basic question? Assuming we agree completely with you  
10 that it's perfectly proper for the state to have an open pri-  
11 mary form of election and that all the reasons you advance are  
12 valid, what is there in the Constitution that requires the  
13 National Convention to accept delegates elected in a manner  
14 that doesn't comply with their rules?

15 MR. LA FOLLETTE: This Court has recognized that  
16 states asserting authority under Article II of the Constitution  
17 have -- are -- have wide interests in regulating the conduct  
18 of primary elections and determining the qualification of voters  
19 in order to protect the integrity of the electoral process;  
20 Storer v. Brown, and most recently, Marchioro, are relevant on  
21 this point. And of course we must remember, and I think it's  
22 important to distinguish, the types of political activities that  
23 a party engages in. Number one, it's obviously a most important  
24 process, we call the public function. And that is the gathering  
25 together of individuals in a political convention to select



1 one of the two candidates who ultimately will become President  
2 of the United States. This process, we contend, is part of  
3 an overall electoral process which states --

4 QUESTION: It's no part of the constitutional electoral  
5 process?

6 MR. LA FOLLETTE: It is no part of the constitutional  
7 electoral process. The party also gathers together in conven-  
8 tion to conduct many other kinds of activities. It writes a  
9 platform, it establishes rules, it does many things that govern  
10 the internal or intra-party affairs of the convention. And we  
11 contend that this distinction must be given great weight by  
12 this Court in permitting states to establish voter qualifications  
13 for citizens within their borders.

14 QUESTION: Has it been known, Mr. Attorney General,  
15 or at least has it been thought and said that sometimes the  
16 opposing political party will enter the primary if an open  
17 primary is available, for purposes of confusing and embarrassing  
18 the opposition?

19 MR. LA FOLLETTE: Your Honor, the record which has  
20 been stipulated here contains all of the relevant studies and  
21 scholarly articles which relate to that question and they all  
22 conclude that there is no evidence of raiding in this case.  
23 And in fact, their own document, the Winograd Commission, con-  
24 cludes that whether or not the Wisconsin law has experienced  
25 raiding is speculative, merely speculation.

1 QUESTION: But what you're saying then, is that the  
2 Democratic National Convention meeting off in Memphis, Tennessee  
3 or in New York cannot have a different view of the matter?

4 MR. LA FOLLETTE: Not when important constitutional  
5 concerns that are properly arrested for the authority of  
6 the state.

7 QUESTION: What is the constitutional concern in a  
8 primary?

9 MR. LA FOLLETTE: To maintain the integrity of the  
10 electoral process, Marchioro said, recognized that the impor-  
11 tant role that the parties play in the selection of national  
12 and state candidates grants significant authority in the states  
13 to regulate those elections in terms of all of the regulations  
14 that election laws presume, voter qualifications, to -- in  
15 order to insure the integrity of that process.

16 That is the constitutional principle that we believe  
17 is enunciated in a long line of cases relating to the right to  
18 vote.

19 QUESTION: Mr. Attorney General, isn't the real  
20 problem here that Wisconsin is extending its long-arm into the  
21 convention in another state?

22 MR. LA FOLLETTE: I'd like to address that question,  
23 Your Honor. Yes, I believe that's --

24 QUESTION: Take the Cousins case while you do it,  
25 will you?

1 MR. LA FOLLETTE: Right, I certainly will. I  
2 believe that that's a very important issue. The question of  
3 the extent and whether or not the Wisconsin order has chosen  
4 the narrowest means possible to effectuate its purpose. First  
5 of all, let's examine the form of the injunction in Cousins.  
6 In Cousins, there was a state court injunction which was issued  
7 against named individuals which forbade them from directly  
8 associating with a political convention which they wanted to  
9 associate with and which wanted them to come in and be dele-  
10 gates. And a criminal contempt process was pending at the  
11 time that these issues came before this Court, having of  
12 course been stayed by the lower courts. The -- probably the  
13 issue involved in that case, involved the affirmative action  
14 rules of the parties as far as slate-making, as far as age,  
15 race, sex; those kinds of qualifications were at issue in that  
16 case. And there was an intervention by a state court, telling  
17 the party and the delegates who were chosen by private caucuses  
18 pursuant to party rules, that met all of these qualifications  
19 that those folks couldn't go to the Democratic National Conven-  
20 tion as delegates because these other folks were elected under  
21 state law and state law prevails.

22 Now as far as voting qualification -- there's one  
23 thing that hasn't been said yet. And that is that under Wis-  
24 consin direct open primary, we vote for candidates, we vote  
25 for President, we vote for the names on the ballot in the

1 Wisconsin Democratic Party -- are the party of candidates for  
2 President. We are not talking about a process under state  
3 law which selects the delegates. Under the state law the  
4 delegates are selected after the primary is over with, by the  
5 state party, under state law they must be party members, they  
6 must be --they must take, the only issue that the party has,  
7 is that they must take a pledge under state law to vote in  
8 accordance with the apportionment that are the results of the  
9 primary election. That is the only thing that the party dis-  
10 agrees with. Otherwise, these folks comply with state law,  
11 they are chosen by the party, and the only interference by this  
12 Wisconsin Court order, which is the narrowest that could  
13 possibly be drawn in order to effectuate the purpose of the  
14 primary which is to guarantee the vote of those people that  
15 went into the privacy of their voting booth and voted for those  
16 particular candidates. And we feel that Cousins is not appli-  
17 cable here, and in fact, we would draw your attention to  
18 Buckley v. Valeo which is, we feel, much more in point as far  
19 as the constitutional issues that are involved in this case.  
20 Where this Court recognized that in the question of disclosure  
21 of campaign contributions, that public disclosure of contri-  
22 butions to candidates in political parties will deter some  
23 individuals who otherwise might contribute.

24 In some instances, disclosure may even expose those  
25 contributors to harassment and retaliation. That's U.S. --



1 424 U.S. at 68. We feel that the minimum intrusion by the  
2 Court order in this -- in the Court below, has -- certainly  
3 does not rise to the test that this Court has applied that it's  
4 necessary that the Appellants here have the burden to show  
5 that they have been substantially interfered with in their  
6 associational rights.

7 QUESTION: I don't believe, General La Follette,  
8 that it appears in the record, but wasn't one of the great  
9 battles after the English or formats of the 19th Century, where  
10 they had enfranchised people to obtain a secret ballot because  
11 the landlord simply stood at the polling place and if the  
12 person had to declare himself openly and orally it was just about  
13 like being disenfranchised.

14 MR. LA FOLLETTE: It is a matter of disenfranchisement.  
15 And I would also point out the Wisconsin open primary is held  
16 in conjunction with the spring election on the same day in  
17 Wisconsin in which literally thousands of our locally elected  
18 officials, our judiciary, our mayors, our city councilmen, our  
19 town board members, are all elected on the same day in a non-  
20 partisan election. And to require the state to change its law  
21 and force people who want to vote in these elections to declare  
22 their party allegiance would certainly frustrate the very sub-  
23 stantial purpose in Wisconsin's electoral process.

24 QUESTION: General La Follette, your opponent says  
25 they are not going to require you to change the law. They simply

1 won't seat your delegates.

2 MR. LA FOLLETTE: Well, we contend that they do not  
3 have the power to refuse. They must meet the burden that  
4 this Court has laid down in claiming infringement of consti-  
5 tutional rights that they must be substantial.

6 QUESTION: Then you admit that Wisconsin is con-  
7 trolling the Democratic convention being held in Timbuktu?

8 MR. LA FOLLETTE: I would say we have the right --

9 QUESTION: Do you admit that? Do you admit that?

10 MR. LA FOLLETTE: Yes, we have the right to do that.

11 QUESTION: All right.

12 MR. LA FOLLETTE: As far as our law is concerned.

13 Thank you.

14 MR. CHIEF JUSTICE BURGER: Very well. Mr. Friebert.

15 ORAL ARGUMENT OF ROBERT H. FRIEBERT, ESQ.,

16 ON BEHALF OF APPELLEE, DEMOCRATIC PARTY OF WISCONSIN

17 MR. FRIEBERT: Thank you, Mr. Chief Justice and may  
18 it please the Court:

19 My name is Robert Friebert and I represent the State  
20 Party in this action. Mr. Justice Stewart, I think, asked one  
21 of the critical questions and that is whether this election is  
22 a part of the constitutional electoral process. It is. It's  
23 the beginning of the electoral process by which states nominate  
24 and elect electors to elect the President of the United States.

25 QUESTION: Well now, the choosing of elect rs is in

1 the Constitution; there's nothing in there about political  
2 parties.

3 MR. FRIEBERT: Well, it's up to the state to determine  
4 how --

5 QUESTION: To choose their electors, yes.

6 MR. FRIEBERT: -- to choose their elect rs. And in  
7 Wisconsin it's a very complex process. It's a complex process  
8 throughout the country. It starts with, in Wisconsin, pri-  
9 maries which, in Wisconsin, has decided that every citizen  
10 should have an opportunity at least once every four years to  
11 determine who they want to be President of the United States  
12 and not wait until November when the choices are narrowed by  
13 the national parties. And so that's the beginning of the  
14 process which culminates in the national party having automatic  
15 ballot access in Wisconsin, just by having the results of their  
16 nominating convention -- it's automatically on the ballot with  
17 the party name listed.

18 QUESTION: What about the states which begin this  
19 process at the precinct level with caucuses? Would you say  
20 the precinct caucus process is part of the constitutional  
21 electoral process?

22 MR. FRIEBERT: Yes, I would say that. Absolutely.

23 QUESTION: That the state could regulate that the  
24 caucuses must take place between 7 o'clock and 10 o'clock in  
25 a home on the main street or something of that kind?

1 MR. FRIEBERT: The National Party is regulated as to  
2 when these primaries take place. I think that what is being  
3 missed here -- excuse me --

4 QUESTION: The state legislature, you say, may  
5 regulate the caucus?

6 MR. FRIEBERT: It may, to a point. It can regulate  
7 it to achieve a certain state fundamental interest. For  
8 example, I think it could regulate the caucus to make sure  
9 that blacks and other minorities are not interfered with in  
10 their right to associate and that has been long held in  
11 the United States v. Classic. Once it's conceded that we have  
12 a public --

13 QUESTION: Classic did not involve a Negro.

14 MR. FRIEBERT: I think, I think when --

15 QUESTION: Classic did not involve a Negro.

16 MR. FRIEBERT: Pardon?

17 QUESTION: The U.S. against Classic did not involve  
18 a Negro.

19 MR. FRIEBERT: Well, the White Primary cases and  
20 there's a generic statement, did involve blacks. The point is  
21 that when we have a decision like Moose Lodge from the Court,  
22 we have, I believe, a statement from the Court that in order  
23 for any of the 14th, 15th Amendment grants to be applicable  
24 you must have a finding that the particular activity involved  
25 constitutes public action. And I think that it's very clear



1 by the decisions of this Court and especially footnote 16 in  
2 Buckley v. Valeo, that at this point in our history it is  
3 beyond doubt that primary contests, party primary contests are  
4 elections and that they can be heavily regulated because there  
5 is a public action that is taking place and that there would  
6 be a certain amount of retreat from that if we could say that  
7 this reform measure at the turn of the century from Wisconsin  
8 which outlawed the very thing that the National Party wanted  
9 to superimpose in Wisconsin -- the very thing that was done in  
10 Michigan. In Michigan, the Attorney General declared that  
11 their open primary statute was unconstitutional and the whole  
12 process was displaced with a party caucus where there were fees  
13 to be paid and as a result, only 15,000 people determined the  
14 delegates from the state of Michigan. It seems to me that that  
15 is not the way this country has gone and that is not the direc-  
16 tion that it should go; that it's a step back and that a reform  
17 measure to increase voter participation in election process  
18 has been viewed as, in Buckley, with great favor. And in this  
19 context, we're not talking about the seating of delegates. We  
20 -- the Wisconsin statute couldn't care less who are the dele-  
21 gates. The only thing that it has focused upon is the appor-  
22 tionment process by which the will of the voters at the primary  
23 becomes effective and that's the reason the injunction was  
24 entered. It is very narrow in scope. And beyond that, in  
25 all of the other party business, the Wisconsin statute couldn't

1 care less.

2 QUESTION: But if you say that, Mr. Friebert, it seems  
3 to me that you haven't explained how you justify the injunc-  
4 tion. Let me put it this way, it seems to me one could agree  
5 with every word in Justice Abrahamson's opinion, and still  
6 not quite understand the theory on which she entered the in-  
7 junction, on which the Court entered the injunction.

8 MR. FRIEBERT: I think the theory on which the injunc-  
9 tion was entered is the basic power that a state has when it is  
10 in the regulating area of voter qualifications to make its  
11 laws effective. And in light of Cousins, and the kind of  
12 meshing of kinds of public action by a National Party and  
13 private action, it should be done in the least offensive manner  
14 to make the law effective.

15 The citizens of Wisconsin have a constitutional right,  
16 as -- or a right as created by the legislature of Wisconsin  
17 to vote in these primaries, then the law can be made effective  
18 in a way which doesn't impair the associational interests of  
19 the National Party. And I think that that's what this Court  
20 indicated in Rosario, for example, that by saying the states  
21 can regulate they can make their laws effective. And it's in  
22 a very, very unoffensive way that the law is made effective.  
23 Indeed --

24 QUESTION: Well now, that's the issue here, isn't it,  
25 as my brother Stevens has indicated? Your state's Supreme

1 Court has said that this state law is binding on the Demo-  
2 cratic National Committee and I'm, when I use the word binding,  
3 I'm quoting from the injunction they ordered.

4 MR. FRIEBERT: Yes.

5 QUESTION: And that is what makes the controversy  
6 here, isn't it?

7 MR. FRIEBERT: Well, I think it's an illusory contro-  
8 versy, they come -- the National Party comes in and claims  
9 a great deprivation of the First Amendment rights without in  
10 any way demonstrating that any of their other programs for  
11 selecting delegates would have any different kind of appor-  
12 tionment. I think that they have the burden in claiming the  
13 First Amendment rights violations, not to speculate about  
14 just what the impact would be.

15 QUESTION: Well I know that your Court said the  
16 impact was speculative and therefore the case was over just  
17 on that ground.

18 MR. FRIEBERT: Yes.

19 QUESTION: But it went on to say that even if it  
20 isn't -- even if it were substantial there's a state justifi-  
21 cation.

22 MR. FRIEBERT: Yes.

23 QUESTION: Now, do you make that claim too?

24 MR. FRIEBERT: I don't get into the state justifica-  
25 tion --

1 QUESTION: You mean, you stop short of that?

2 MR. FRIEBERT: Yes. But it doesn't have to go that  
3 far, because they, the National Party --

4 QUESTION: The state Court went that far, and if it  
5 were easier to accept that branch of its judgment than the  
6 other --

7 MR. FRIEBERT: I agree.

8 QUESTION: Or do you, you back away from that part of  
9 it, though.

10 MR. FRIEBERT: I don't back, I back away -- the way  
11 the state party way of presenting the brief, because I don't  
12 have to reach that question, because of several reasons.

13 One, if it is recognized that this is a public  
14 interest or public action activity by the National Party, then  
15 it seems to follow, it can be regulated. And by definition,  
16 almost by constitutional definition, it is not a First Amend-  
17 ment problem. Secondly, there is no showing in the context of  
18 apportionment of delegate strength among various contenders for  
19 President that anything would be any different if a different  
20 method were used.

21 QUESTION: Mr. Friebert, what if the Democratic  
22 National Committee had never come into the Wisconsin courts,  
23 and the Wisconsin primary had proceeded according to Wisconsin  
24 law and then when it came time for credentials hearings or a  
25 seating at the Democratic National Committee, the Democratic



1 National Committee simply refused to seat the Wisconsin dele-  
2 gates? Do you think that would be permissible?

3 MR. FRIEBERT: No. It's a part of the process which  
4 results in -- result of that convention gets automatic valid  
5 access. The party can't go walk down a one-way street. They  
6 love the automatic ballot access, they love having their name  
7 on the Wisconsin ballot, they love the context and the appoint-  
8 ments that they get in Wisconsin just by virtue of being a  
9 party, and it seems to me that that intertwining is a two-way  
10 street. And I think that that -- the two-way street is that  
11 it is private, in some respects as is stated in Cousins and it  
12 is public in other respects, especially when we're talking  
13 about the critical franchise which is given by a state. And  
14 in federal elections it can be further regulated by Congress  
15 if it chooses to come into the area. So that the full  
16 extent of the National Party's position is that Wisconsin could  
17 conduct a closed primary only if they wanted a closed primary.  
18 If they wanted caucuses, they could outlaw it too. It's the full  
19 extent -- of their position is that these state laws only are  
20 enforced if they want them to be enforced.

21 QUESTION: When you say they, you mean the Democratic  
22 National Party?

23 MR. FRIEBERT: The National Party, yes sir.

24 QUESTION: That isn't quite -- I don't think that's a  
25 fair statement of their position. They said they are perfectly

1 valid laws, they just won't seat your delegates.

2 MR. FRIEBERT: They just won't let them be -- any  
3 meaning to them. They are perfectly valid and the state of  
4 Wisconsin can go out and have an intellectual exercise --

5 QUESTION: Just as they did in Cousins v. Wigoda,  
6 that delegation was elected pursuant to Illinois law and they  
7 refused to seat them.

8 MR. FRIEBERT: I think Cousins v. Wigoda, it doesn't  
9 -- it's not the best applicable case to this. I think it is  
10 Buckley -- but Cousins had as one of its major, major  
11 aspects is that they were concerned there with who were the  
12 delegates, which we are not concerned with here, here we are  
13 concerned with who are the voters. And that is a completely  
14 different question, and I think extremely important --

15 QUESTION: Well if you're not concerned with who the  
16 delegates are, you can't possibly justify the injunction.

17 MR. FRIEBERT: We care how they vote at the conven-  
18 tion on the first ballot, and beyond, and that's the only thing  
19 we care about. Nothing else. We don't care who does it. That  
20 is a private matter. I think it accommodates Cousins. But  
21 Cousins involved a -- there was no conflict between a state  
22 law in Cousins as such, and a party rule, because --

23 QUESTION: Yes there was, the Illinois law provided  
24 one method of election and the other slate was not elected  
25 pursuant to that method.

1 MR. FRIEBERT: No, the Illinois law was neutral on  
2 the process by which delegates could be chosen. What happened  
3 there is, we had an intra-party squabble between people in  
4 the Chicago area who were enforcing a slate. And that was the  
5 real underlying fight. And then they hid under the Illinois  
6 law, to say, now you've got to accept our previous violation  
7 to the rule, I think that that's what is underneath Cousins.  
8 Very much what's underneath Cousins.

9 They used the Illinois law as a refuge in an attempt  
10 to circumvent the national rules, that that's what was at stake  
11 and therefore is a complete --

12 QUESTION: Well aren't you using Wisconsin law in  
13 an effort to circumvent the national rule in exactly the same  
14 way? You're not complying with the national rule so you're  
15 circumventing it.

16 MR. FRIEBERT: No, it's not -- the state party of  
17 Wisconsin is not the Wisconsin legislature and what we had in  
18 Illinois was a state party or a Chicago party attempting by  
19 its slate-making processes --

20 QUESTION: Which complied fully with the Illinois  
21 statute.

22 MR. FRIEBERT: It did comply fully, but they didn't  
23 comply with the party rule --

24 QUESTION: Didn't comply with the party rule, it's  
25 precisely the same situation here.

1 MR. FRIEBERT: Because they were slate-making; they  
2 was no juggernaut between the state party, the national rules  
3 and the Illinois law, which is true here, and besides  
4 that, it was going to a different interest. In this case, we  
5 are in the interest of apportioning the will of the Wisconsin  
6 voters to the choices made in the party. That was not an  
7 issue in Illinois; Illinois does not have, I don't believe,  
8 a choice, or at least not in 1976 or '72, a binding primary,  
9 it was advisory only. So the Illinois --

10 QUESTION: It's binding with respect to who the  
11 delegates would be.

12 MR. FRIEBERT: Yes, but not the more fundamental  
13 point as to who should be President of the United States,  
14 that's a lot more important to the public than who the dele-  
15 gates are, it seems to me.

16 QUESTION: Did I understand you correctly, to say  
17 that Wisconsin's interest was in how the delegates voted at  
18 the convention?

19 MR. FRIEBERT: On the nomination process, yes.

20 QUESTION: At the convention?

21 MR. FRIEBERT: Yes. In effectuating the will --

22 QUESTION: Under the long-arm, that's a rather long  
23 arm, isn't it?

24 MR. FRIEBERT: Oh, I think it's the first step in  
25 the process by which people become President or nominees for



1 President of the United States, and it is intertwined in the  
2 voter qualification powers that we have as a state, subject to  
3 Congressional regulation in a federal election and also under  
4 the 12th Amendment as a part of a complex process for  
5 its electors --

6 QUESTION: Mr. Frieibert, why couldn't the state  
7 interest you described be adequately protected by a statute  
8 that said whoever the delegates are they shall vote, at least  
9 on the first ballot or on the second ballot, for the presiden-  
10 tial candidate who receives the largest vote in the primary?

11 MR. FRIEBERT: That's a choice that the Wisconsin  
12 statute gives; a winner take all statute. The Wisconsin  
13 statute allows a winner take all, but the party can choose  
14 apportion and the party has chosen apportionment in this  
15 instance.

16 QUESTION: I see.

17 MR. FRIEBERT: Thank you.

18 MR. CHIEF JUSTICE BURGER: Do you have anything  
19 further, Mr. Eastman?

20 ORAL REBUTTAL ARGUMENT OF RONALD D. EASTMAN, ESQ.,

21 ON BEHALF OF THE APPELLANTS

22 MR. EASTMAN: Mr. Chief Justice, I don't feel the  
23 need to say anything further, but I'm prepared to answer ques-  
24 tions.

25 QUESTION: Let me just ask this one question.

1 Supposing the Wisconsin statute divided by districts, says that  
2 the person-- the presidential candidate who receives the most  
3 votes in a given delegate district, however they are appor-  
4 tioned, shall be the candidate for whom the delegates from  
5 Wisconsin shall vote. In other words, you could pick the  
6 delegates, but on the first ballot they've got to vote for  
7 the people that represent the majority. Would that comply  
8 with your rules?

9 MR. EASTMAN: No, it would not, so long as the primary  
10 was an open primary and non-Democrats --

11 QUESTION: So the open primary objective is not  
12 merely the selection of delegates but also the determination  
13 of the person for whom they might vote?

14 MR. EASTMAN: Absolutely, Justice Stevens. The  
15 heart of this case is the process of selecting the nominee,  
16 not merely delegates who are bound to hold their hands up to  
17 cast a predetermined vote. Although I might add, actually  
18 the delegates functions are mightily affected by the candidate  
19 apportioning, because the candidate gets a certain number of  
20 members on the credentials committee, a certain number on the  
21 platform committee and a certain number on the --

22 QUESTION: Mr. Eastman, the Wisconsin delegation was  
23 in fact, seated last summer, was it not?

24 MR. EASTMAN: Yes, it was, Justice Stewart. Again --

25 QUESTION: Although there was a stay of the -- of

1 the Wisconsin Supreme Court's order, was there not?

2 MR. EASTMAN: Yes. And the party very much appre-  
3 ciated being able to -- the Court's stay, which was issued  
4 sua sponte, and having the ability to make that decision free  
5 of the compulsion of the Wisconsin Court's order, there simply  
6 wasn't enough time left or really the resources, unfortunately,  
7 for the party to go out and run an alternate delegate selection  
8 system, the National Party, without the cooperation of the  
9 State Party.

10 QUESTION: So there's really no alternative, at  
11 least there was no other delegation?

12 MR. EASTMAN: That there was no other delegation,  
13 it was impractical for us to try to create one.

14 QUESTION: And why isn't this moot?

15 MR. EASTMAN: It isn't moot for several reasons.  
16 First, the Wisconsin Court order as I mentioned has continuing  
17 effect. Secondly, the issue is not only capable of repetition  
18 but it's almost virtually certain to be repeated, because I--  
19 there's -- I see no evidence that Wisconsin is going to change  
20 its statute and I see very, very strong evidence that the  
21 Democratic Party is not going to change its democrats only  
22 rule. And furthermore, it will almost certainly evade review  
23 if the case doesn't -- the issue will almost certainly evade  
24 review if the Court doesn't decide it now, because by the time  
25 the controversy arises, in the nature of the process of

1 approving delegate selection plans and so on before the con-  
2 vention, the controversy won't really arise as it didn't this  
3 time, until about eight months before the Wisconsin primary  
4 election which is held in April, and about a year before the  
5 convention, as was the case this time, and that simply isn't  
6 enough time to get a conclusive final adjudication of the  
7 constitutional issues which have been raised here.

8 QUESTION: Mr. Eastman, would you say that, that  
9 the state of Wisconsin is constitutionally prohibited from  
10 legislating, allowing a closed primary as you want, the declar-  
11 ation of the Democratic loyalty, but saying that delegates from  
12 the Fourth and Fifth, votes from the Fourth and Fifth Districts  
13 shall be counted as electing so many delegates; in other words,  
14 having a congressional district apportionment?

15 MR. EASTMAN: If I understand your hypothesis to be  
16 that the issue would not be necessarily closed versus open  
17 primary --

18 QUESTION: Right.

19 MR. EASTMAN: -- but the apportionment of delegates --

20 QUESTION: Right.

21 MR. EASTMAN: -- yes, apportionment of delegates  
22 selected from the state, but actually selected to -- by the  
23 State Party to be at the convention, yes, I would say that the  
24 Democratic National Convention and the Democratic Party could  
25 decide on the apportionment of delegates from the state on the



1 method of apportionment, and that if the state mandated a  
2 different one, the state could not constitutionally enforce  
3 that different allocation.

4 QUESTION: Even if the state said apportion accord-  
5 ing to the vote and the Democratic Party said winner take all?

6 MR. EASTMAN: I think that's correct. And the fact  
7 that the Democratic Party --

8 QUESTION: It's true, you would take the same posi-  
9 tion both ways?

10 MR. EASTMAN: Yes.

11 QUESTION: Now the Democratic Party has rules, does  
12 it not, requiring that state delegations be representative of  
13 various, or have certain quotas of various age groups and  
14 genders and --there being only two genders -- and be racially  
15 diverse in some of them, does it not?

16 MR. EASTMAN: It has guidelines to provide certain  
17 affirmative action steps and in fact, it did require this year  
18 that 50 percent of the delegates are women.

19 QUESTION: So that if a state law should say, men only  
20 for example, or people only over 35, or something like that,  
21 that would also in your view be unconstitutional because it  
22 would impair your constitutional right of free association?

23 MR. EASTMAN: So long as there was a contrary party  
24 rule, yes. Now I'm not addressing -- I'm not addressing if  
25 it would be a -- there may well be other constitutional

1 constraints on the Democratic Party's choices and that gets  
2 into a whole question that's not presented here, of whether  
3 the party's action is a state action and so forth and whether  
4 it can -- whether certain individuals can be precluded, but  
5 that's not this case.

6 QUESTION: You do adhere to the view that if the  
7 Wisconsin legislature says half of the population of the state  
8 lives in the lake shore counties and half of the population  
9 lives in the other half of the state, then half of the dele-  
10 gates shall be elected by the lake shore county closed declared  
11 Democrats and half shall be elected by the other declared  
12 Democrats?

13 MR. EASTMAN: That is our view, Mr. Justice Rehn-  
14 quist, and in fact, that very issue was brought up in the  
15 context of the Republican Party's allocation of its delegates  
16 in certain states, in a case decided by the D.C. Circuit not  
17 long ago, the Ripon case, which is cited in the briefs. And  
18 the D.C. Circuit said that the State Party -- that the Repub-  
19 lican Party had a right to determine its own apportionment.

20 QUESTION: It wasn't a state action?

21 MR. EASTMAN: No, it wasn't quite the same thing.

22 QUESTION: Mr. Eastman, do you -- so if this injunc-  
23 tion order were revoked at this time, you would say there's  
24 still a case or controversy here that should be decided? If  
25 the injunction were revoked --

1 MR. EASTMAN: Yes. Because --

2 QUESTION: Because the statute is still of operative  
3 force.

4 MR. EASTMAN: Yes. I believe that the Wisconsin  
5 Supreme Court's declaration is faithful to what the statute  
6 has --

7 QUESTION: Mr. Eastman, I suppose you'd take the same  
8 position if the Democratic Party rule said no delegate shall  
9 be seated unless his loyalty to the Democratic Party shall be  
10 certified by the state chairman?

11 MR. EASTMAN: While I can't imagine the Democratic  
12 Party adopting that rule, I would take the same position.

13 QUESTION: It would be the same issue, wouldn't it?

14 MR. EASTMAN: Yes.

15 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The  
16 case is submitted.

17 (Whereupon at 1:53 o'clock p.m. the above-entitled  
18 matter was submitted.)  
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25

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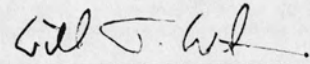
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