

In the

ORIGINAL

Supreme Court of the United States

CARL W. BROWN,

Petitioner

v.

EARL J. HARTLAGE

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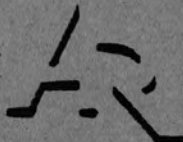
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Washington, D. C.

Wednesday, January 20, 1982

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CARL W. BROWN,

4                                  Petitioner

5 v.

6 EARL J. HARTLAGE

7 - - - - - x

8 Washington, D.C.

9 Wednesday, January 20, 1982

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

## 12            APPEARANCES:

13 FRED M. GOLDBERG, ESQ., Louisville, Ky.; on  
behalf of the Petitioner.

15 L. STANLEY CHAUVIN, JR., ESQ., Louisville, Ky.; as  
amicus curiae.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

FRED M. GOLDBERG, ESQ.,  
on behalf of the Petitioner

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L. STANLEY CHAUVIN, JR., ESQ.,  
as amicus curiae

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1                                    P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER: We will hear arguments  
3 first this morning in Brown against Hartlage.

4                    Mr. Goldberg, you may proceed whenever you're  
5 ready.

6                    ORAL ARGUMENT OF FRED M. GOLDBERG, ESQ.,

7                    ON BEHALF OF THE PETITIONER

8                    MR. GOLDBERG: Mr. Chief Justice, and may it  
9 please the Court:

10                   This matter is before the Court this morning on a  
11 writ of certiorari of the Court of Appeals of Kentucky. The  
12 issues raised involve issues of First Amendment rights of  
13 political speech, and specifically whether this speech has  
14 been infracted by Kentucky Revised Statute, which I may  
15 refer to as KRS, 121055. The Court will find that in the  
16 statutory appendix to the brief on the merits at page 11.

17                   That statute has been interpreted, in our opinion,  
18 in such manner as to encroach upon the Petitioner's rights  
19 under the First Amendment. The specific issues before the  
20 Court this morning will be vagueness and overbreadth, will  
21 be the creation of artificial distinctions based on content  
22 or speaker, and the threshold issue of clear and present  
23 danger and whether that doctrine was applied by the courts  
24 of Kentucky appropriately in this case or at all indeed.

25                   As applied in the facts at bar, this case or this



1 statute would prohibit a candidate from promising in an  
2 election campaign the pro tanto reduction of taxes.  
3 Generally speaking, the proceedings below were that the  
4 trial court found that the statute had been violated, but on  
5 interesting findings which I will discuss with the Court in  
6 a minute found that the election should not be voided. To  
7 the contrary, he found that the Petitioner here was fairly  
8 elected.

9         The matter was appealed to the Court of Appeals of  
10 Kentucky, and it found a violation of the statute as  
11 interpreted and found that the statute should be strictly  
12 applied and the election voided.

13         On a petition for rehearing to the Court of  
14 Appeals of Kentucky -- and the Court of Appeals of Kentucky  
15 is now our intermediate appellate court. At some points the  
16 cases will have come from the Court of Appeals of Kentucky,  
17 and at another point the case will come from the Supreme  
18 Court of Kentucky. I'll attempt to distinguish the two as  
19 we move through.

20         The Court of Appeals on its petition for rehearing  
21 then reconsidered, found that the statute was still  
22 violated, but on the other hand expressed some reservation  
23 in regard to the constitutionality and the overbreadth of  
24 the statute, and nonetheless overruled the lower court.

25         A petition was then filed or motion for

1 discretionary review to the Supreme Court of Kentucky, our  
2 now highest appellate court, and that was summarily  
3 overruled. This Court granted certiorari and we're here on  
4 the following facts.

5           Carl Brown, the Petitioner in this matter, sought  
6 the office of county commissioner of Jefferson County,  
7 Kentucky. Jefferson County, Kentucky contains the only city  
8 of the first class in Kentucky, and in that regard in the  
9 Joint Appendix you will find some statutes that refers to  
10 city of the first class. That is only in Jefferson County,  
11 Kentucky, if the Court will.

12           But in any event, Carl Brown sought a seat on the  
13 Fiscal Court, which is our legislative body which along with  
14 the county judge executive forms the executive branch of  
15 government of the county, although it has legislative  
16 functions as well, pass ordinances, et cetera.

17           This was in the election of 1979. Brown and a Dr.  
18 Bill Creech were running mates on a joint platform as the  
19 Republican candidates and ran against the Respondent, Earl  
20 Hartlage, as the Democratic incumbent.

21           Now, the Petitioner and Creech campaigned on  
22 issues of governmental economy and the usual issues that one  
23 would expect of an election of that nature. Specifically,  
24 they zeroed in on some of Hartlage's spending and primarily  
25 in at least one press release that is available to you-all

1 commented very unfavorably in regard to the salary which Mr.  
2 Hartlage had voted himself since he had been in office.

3           In all events the election heated, and by August  
4 15th, 1979 Creech and Brown issued a joint press release.  
5 That may be found at the Joint Appendix, page 2. And in  
6 that statement they attacked the frivolity of spending of  
7 Hartlage and almost in a manner as I perceive the statement  
8 and as it appears, almost in a manner of put up or shut up  
9 vein said to prove the strength of our convictions, we will  
10 reduce our salaries by the sum of \$3,000 a year each.

11           The statement was made, and within the next day or  
12 two a friend of Brown's contacted him and advised him that  
13 it may be arguable whether there was some problem legally  
14 with that statement or with that comment. Brown's a young  
15 lawyer, and he went to his office and indeed did some  
16 research and found that certainly someone had articulated an  
17 arguable question under the law of Kentucky, that there were  
18 some Kentucky cases that may look like they make that an  
19 illegal promise, that it is inconceivable that his election  
20 could have been voided.

21           In all events on Monday, I believe, but the 19th  
22 day of August 1979, four days after the comment was made,  
23 Brown and Creech in a joint press conference, which received  
24 the same publicity and the same coverage as the original  
25 statement, retracted that statement. They acknowledged that

1 the statement was perhaps arguably in error. They retracted  
2 the promise, said that they would not abide by the concept  
3 of that reduction.

4 Now, the election was held on November the 6th,  
5 1979, 78 days after the retraction. There had been no  
6 retreat from the retraction from the time it was made until  
7 the time of the election. The results of the election, of  
8 the 177,501 ballots cast, Brown received approximately 53  
9 percent of the vote. He beat Hartlage by 10,151 ballots.  
10 And Dr. Creech was defeated. He was not elected, though  
11 having made the same commitment as Brown had made or the  
12 same promise.

13 Seasonably, an election contest was filed in early  
14 December of 1979. An answer was appropriately filed and  
15 issues joined. In that answer the fifth affirmative defense  
16 raises the constitutional issues before this Court. They  
17 have consistently been argued and raised from the trial  
18 court through the Court of Appeals to this Court.

19 Pardon me, please.

20 The matter was tried in a bench trial on January  
21 29th and 30th, 1980, and the evidence, among the rest of the  
22 evidence appears a stipulation by the Petitioner and by the  
23 Respondent that the retraction received as broad a coverage  
24 publicity-wise as the original statement.

25 The trial court then rendered its decision and



1 found that there was a technical, if you will -- and that's  
2 my own characterization -- a technical violation of KRS  
3 121055, the statute which prohibited the promise to the  
4 electorate, but that the election was fair. And the trial  
5 judge found as a fact in his determination of the fairness  
6 of the election, he found five elements.

7           He found that there was an almost immediate  
8 retraction. He found that there was no retreat from the  
9 retraction from the day it was made to the day of the  
10 election, and commented even though Mr. Brown had been  
11 challenged by Mr. Hartlage at some political conclave, Brown  
12 remained adamant in his retraction and did not deviate from  
13 that.

14           The judge balanced the disenfranchisement of  
15 thousands of voters, as he put it, and the presumption of  
16 the will of the people and Creech's defeat, and found that  
17 the election was fair and that Brown should receive his  
18 office.

19           Now, the Court of Appeals of Kentucky in its  
20 original opinion rendered August the 8th, 1980 followed an  
21 old decision in Kentucky that harks back to 1960, Sparks  
22 against Boggs.

23           And it may be appropriate for me to digress for a  
24 moment and advise the Court as to the ramifications of  
25 Sparks against Boggs and a prior opinion that harks to 1925,

1 Owsley against Hill. These two cases, in my judgment, are  
2 probably interpretive of some phases of the statute and  
3 require some comment.

4           In the Owsley matter the county attorney offered  
5 to serve for a salary of \$400 less than the previous  
6 attorney had received. His salary had not been sent by the  
7 county commissioner. His election was challenged. He won,  
8 and his election was challenged. In any event, upon  
9 challenge the then Court of Appeals of Kentucky -- and it  
10 was our highest court in 1925 -- held that the reduction of  
11 salary was a legal possibility in the context of the fact  
12 that it had not been set, and also said in its opinion that  
13 a promise that is made to the entire electorate is not a  
14 bribe and not to be conceived as a bribe, but it  
15 differentiated that from a promise made to a smaller group  
16 of the electorate. In that case then it was held that the  
17 county attorney would be seated.

18           In 1960 in the matter of Sparks against Boggs,  
19 which itself was the election of a group of city  
20 commissioners of the city of Hazard, Kentucky who ran as  
21 platform. The salary in that instance had been previously  
22 set by statute at \$500 each per year. The commissioners  
23 promised as a plank of their platform that they would forego  
24 all but a dollar of that sum and contribute it to various  
25 charitable, some civic, Little League, and organizations of

1 that sort. It was not a commitment to the entire electorate  
2 but to a select group in the electorate.

3           The Court of Appeals of Kentucky in that case  
4 distinguished Owsley -- again, that was our highest court at  
5 the time -- distinguished Owsley and in effect said that the  
6 promise to serve for less was a bribe and as such should be  
7 barred.

8           Now, in that light we find that the Court of  
9 Appeals of Kentucky in the Carl Brown case, the case before  
10 you this morning, in the Carl Brown case held that Brown  
11 could not legally do the act, he could not legally reduce  
12 his salary; and in that regard there was no exception in the  
13 statute for a retraction; in that regard that the other  
14 considerations of the trial court were inapplicable and not  
15 to be considered; and that the statement was not  
16 constitutionally protected under the aegis of the  
17 Constitution of the United States.

18           Now, on the --

19           QUESTION: Mr. Goldberg?

20           MR. GOLDBERG: Yes, ma'am.

21           QUESTION: Do you interpret these cases in the law  
22 of Kentucky to provide then that the statute forbids only  
23 campaign promises to perform illegal acts?

24           MR. GOLDBERG: Justice O'Connor, I perceive --  
25 yes. My answer to your question would be yes. However, the

1 problem will arise in a moment in my argument as to how in  
2 the world we determine what's illegal or legal. But I  
3 perceive that interpretively speaking the statute prohibits  
4 illegal acts --

5 QUESTION: Promising to do an illegal act.

6 MR. GOLDBERG: A promise to do an illegal act, or  
7 perhaps better stated, if I may, an act incapable of legal  
8 accomplishment. There is some nuance of difference that's  
9 sort of fuzzy in my mind, I must tell you; but I think  
10 that's what it says.

11 Now, in that regard then -- I'm sorry. Did that  
12 answer your question?

13 QUESTION: Yes. Do you take the position that  
14 what was stated by the candidates in this case was something  
15 that was not capable of legal accomplishment then?

16 MR. GOLDBERG: I do not necessarily take that  
17 position, but I think that I would have to take that  
18 position for the purposes of this case.

19 QUESTION: Okay.

20 MR. GOLDBERG: Now, on the petition for rehearing  
21 rendered on October 29th, 1980, the Court of Appeals of  
22 Kentucky perceived that the Petitioner's position was not  
23 without logic or appeal, but suggested that if you want the  
24 relief that you request of us, we perceive your argument to  
25 be that one of overbreadth on a federal constitutional



1 basis. But if you want that relief, go to the Court of  
2 Appeals -- Supreme Court of Kentucky and they are the court  
3 that can grant you the relief that you seek. It would be  
4 judicial anarchy for us to overrule Sparks against Boggs.

5 Now, on that state of facts obviously we  
6 petitioned the Supreme Court of Kentucky, and we were  
7 summarily turned down. This Court has granted us the writ.

8 Now, at the outset of argument I would suggest to  
9 the Court that I concede that the Commonwealth of Kentucky  
10 has an interest in the electoral process. It would be  
11 foolish for me to say otherwise. However, I argue and urge  
12 that that is not an uninhibited interest, that is not  
13 uninhibited as to political speech particularly, but that  
14 that interest must be balanced against the intrusions on the  
15 First Amendment right.

16 I don't think that your amicus or I disagree that  
17 this was political speech. The problem that we disagree on  
18 is where the interpreted statute impacts the rights of Carl  
19 Brown and where it crosses the bounds of propriety  
20 circumscribed around the First Amendment by this Court.

21 QUESTION: Mr. Goldberg, do you think that under  
22 Kentucky law a campaign promise to try to cut government  
23 expenditures and reduce taxes would be legal or illegal?

24 MR. GOLDBERG: I'm inclined that the promise to  
25 cut taxes would be illegal, and that's part of the vagueness

1 argument, Justice O'Connor; and it runs something like  
2 this. If we posit that the Owsley and Sparks decision  
3 prohibit the making of a promise that would inure to the  
4 benefit of all the public and it is incapable of being  
5 legally performed, I'd suggest to you that a candidate for  
6 any office -- in the Senate, in the legislature, or in the  
7 executive branch of government -- couldn't make that promise.

8           The vagueness is inherent in the fact that no  
9 single member of any body of government without the  
10 cooperation of a majority of his house or a majority of his  
11 group and without the imprimatur of the chief executive can  
12 ever make such a promise. So I have a difficult time with  
13 that situation.

14           QUESTION: What would be the situation, counsel,  
15 if he carefully phrased his remarks to say if elected I will  
16 advocate a program of reduction of salaries generally?

17           MR. GOLDBERG: Mr. Chief Justice, I think that the  
18 question or the problem presented by the phrasing of the  
19 hypothetical "if" prior may defeat the whole impact of what  
20 I perceive the First Amendment to award. This is an  
21 advocacy situation. It is projected in a political arena.  
22 I don't feel that the First Amendment or this Court has ever  
23 required that a man use the precision of words in political  
24 speech that would require him to wonder should I say this or  
25 not.

1           To do that, Mr. Chief Justice, in my judgment  
2 would make my awful antsy if I were a candidate, because it  
3 would chill my speech. It would remove my thought processes  
4 from my head, and in the last analysis the interchange of  
5 ideas, sir, is the fundamental of the First Amendment.

6           QUESTION: Well, supposing your candidate is  
7 speaking before a group of Little League people and says if  
8 elected I'm going to promise to get \$5,000 for the Little  
9 League that they don't presently have coming out of the  
10 county treasury.

11           Now, I take it that would violate the statute,  
12 wouldn't it?

13           MR. GOLDBERG: Mr. Justice Rehnquist, I believe it  
14 would.

15           QUESTION: Now, do you say that's protected by the  
16 First Amendment?

17           MR. GOLDBERG: No, sir, I do not.

18           QUESTION: How do you distinguish that from --

19           MR. GOLDBERG: I distinguish that in this way,  
20 sir. Here we offer to the electorate as a whole to reduce  
21 taxes. The Little League question is a special interest  
22 group.

23           I'm sorry. I may have given you an erroneous  
24 answer. It probably would because it singles out under  
25 Owsley -- I'm sorry, sir; I wasn't quick enough for the

1 question. Under the Owsley case in Kentucky it is a select  
2 group, and it would. My answer to your question would  
3 change, sir.

4 QUESTION: Well, in a sense taxpayers are a select  
5 group, too, aren't they? All of the people in the  
6 electorate are not necessarily taxpayers.

7 MR. GOLDBERG: I would agree with that, sir. I  
8 would suggest to you that in Kentucky the presumption of the  
9 electorate and the taxpayers, apparently from the Owsley  
10 case, are one and the same.

11 I would point out to the Court or to you, sir,  
12 that, for instance, a commitment, I shall aid the elderly,  
13 is a select group in my judgment. There are many select  
14 groups to which politicians appeal, and in that regard  
15 that's the problem I have with this statute in terms of  
16 vagueness. It really doesn't say that you could get out and  
17 run a rip-roaring political campaign, make legitimate  
18 promises -- I'm not advocating any promise that is not  
19 usual, if you will, sir; but on the other hand, I feel that  
20 the inhibitive factors of this statute place a pall over  
21 political speech, and that's where I think that it's vague.  
22 There is no means by which a candidate of common  
23 intelligence in my judgment can ascertain exactly where do I  
24 cross that line.

25 QUESTION: But your client did ascertain, and



1 apparently as a result of his retraction felt that he may  
2 well have crossed the line at any rate and --

3 MR. GOLDBERG: He felt -- pardon me, sir.

4 QUESTION: And made the retraction.

5 MR. GOLDBERG: Yes, sir. I concede that point.  
6 It's evident in the facts. But I am suggesting to you that  
7 he had to go research, as a young lawyer, he had to go  
8 research that problem out. And it is not without debate.  
9 Your amicus curiae and I both have argued both sides of the  
10 issue in this matter; and it occurs to me that the argument  
11 itself, Mr. Justice Rehnquist is dispositive of the  
12 vagueness of this statute; that there is no clear line of  
13 political speech that Carl Brown could have relied upon.

14 In that regard then with the no notice concept in  
15 this statute, we have to look at another concept that these  
16 facts give rise to and which have been briefed; and that is  
17 that in Kentucky a county commissioner in a county  
18 containing a city of the first class has a benchmark salary  
19 and he has an escalated salary by what we Kentuckians call  
20 the rubber dollar concept to make up for the inflationary  
21 action on all salaries.

22 The base salary for a county commissioner in a  
23 county containing a city of the first class is found in KRS  
24 6530 sub 6, and that appears in the Appendix to the brief,  
25 and it sets that benchmark salary at \$9,600. That is the

1 legal salary, I don't know, except that I do know that it is  
2 permissible in Kentucky, the Fiscal Court may -- it's  
3 written in the permissive -- may escalate those salaries up  
4 to an administrative sum determined by the State Finance  
5 Department.

6           Now, we get to the very interesting question in my  
7 judgment. Carl Brown offered to serve at the time for what  
8 amounts to \$17,000. The rubber dollar concept had been  
9 applied to his situation or to the office which he sought.  
10 He in effect said I will serve for \$17,000, not the \$20,000  
11 that Mr. Hartlage is getting. Does that create a legal  
12 impediment?

13           The legal salary, if we are going to saddle Brown  
14 with determining that which is legal, then the legal salary  
15 would have to be brought down. The question would then  
16 arise does Brown have a right to give up that which is not  
17 part of the legal salary, the \$9,600, or does he have a  
18 right to give up his rubber dollar theory or his rubber  
19 dollars. And there is a prohibition in the rubber dollar  
20 statute that reads to the effect that you shall not change  
21 your salary or you shouldn't change your salary during the  
22 term in which you're elected.

23           Now, in that regard then I would suggest also that  
24 a threshold question to the restraint on advocacy has to  
25 have been announced by this Court long ago, and in Landmark

1 Communications against Virginia we find the clear and  
2 present danger test used.

3           In this instance and in the matter at hand, Brown  
4 retracted 78 days prior to the election. He never retreated  
5 from that retraction. His running mate who made the same  
6 comment and the same promise to the electorate was  
7 defeated. Brown won by a resounding number of votes. And  
8 in this regard I submit to this Court that there cannot  
9 possibly have been any threat to the compelling interest of  
10 the Commonwealth in regard to the Brown statement. It  
11 simply was not the reason the electorate chose him.

12           QUESTION: Mr. Goldberg, does the state have to  
13 show that each such election promise constitutes a clear and  
14 present danger to the electoral integrity, or is it enough,  
15 do you think, that the state simply shows that the promises  
16 as a class tend to mislead the electorate?

17           MR. GOLDBERG: Justice O'Connor, I would suggest  
18 that I read Landmark Communication -- and I'm not going to  
19 presume to tell this Court how to read it -- but I read it  
20 to say that there should be a balancing mechanism whenever  
21 the issue arises. In that regard it was not used in this  
22 instance. It was ignored. To the contrary, our Court of  
23 Appeals said that a retraction and the other items, which  
24 really were a balancing mechanism used by the trial judge,  
25 are to no avail.

1           Our statute stands as written, and if you cross or  
2 transgress that line, if those words cross our lips, I would  
3 pose the rhetorical question that suppose I use the word  
4 "not" or in my response to Justice Rehnquist a moment ago I  
5 corrected myself. Were Justice Rehnquist operating under  
6 the statute as I perceive it in Kentucky now, it would have  
7 been too late for me to correct myself; it had passed my  
8 lips.

9           I'll reserve my remaining time, sir.

10          CHIEF JUSTICE BURGER: Mr. Chauvin.

11          ORAL ARGUMENT OF L. STANLEY CHAUVIN, JR.

12                           AS AMICUS CURIAE

13          MR. CHAUVIN: Mr. Chief Justice, and may it please  
14 the Court:

15           It is not particularly pleasant to become involved  
16 in an electoral dispute. Courts have historically  
17 restrained themselves from involvement unless there is  
18 clear, convincing, glaring and measurable regularity which  
19 cries out for judicial intervention.

20           The sanctity of the freedom of voters choosing  
21 their new leaders or retaining incumbents is indelibly  
22 etched in the history of our nation. One of the attractions  
23 of our system of government is the assurance of meaningful,  
24 participatory and effective suffrage. But Congress and  
25 state legislatures have set minimum standards for



1 participating both as candidates and as voters. Education,  
2 experience, or social standing are not legitimate criteria.  
3 With some obvious exceptions such as years of admission to  
4 the bar before seeking a judgeship, legislative bodies and  
5 constitutions have required no greater qualification for  
6 those who seek election than for those who vote for them.  
7 Normally a length of residency requirement for state  
8 candidates but not even this for federal. Age is usually a  
9 requirement. So who may seek office and who may hold office  
10 is proscribed and encumbered minimally.

11           As sure as restraint has been shown, response has  
12 been the key when the process has been corrupted or to avoid  
13 the appearance of corruption. It took a lot of years and  
14 effort to remove the government itself as a corrupting  
15 factor when citizens otherwise qualified were excluded  
16 strictly because of race from the electoral process by  
17 outright abuse and governmental legislation.

18           This Court through its intercession and  
19 interpretation removed this cancer. This Court has  
20 repeatedly said that the minimal requirements are the only  
21 ones, and artificial, unreasonable, unscrupulous or  
22 unconscienable barriers will not be tolerated.

23           The Court has promptly responded to criminal acts  
24 which corrupt the process. Bribing voters always, both  
25 state and federal, has been forbidden. As an aside, just as

1 paying for votes is proscribed, likewise paying to vote by  
2 the means of a poll tax has been extinguished. It would  
3 trifle with this Court to review further the strong  
4 interest, both legislatively and judicially, which has been  
5 shown to forbid outright, overt, and damnably cruel acts to  
6 tamper with the electoral process.

7 Another area, and difficult to administer, has  
8 been the regulating of acts which are neither  
9 constitutionally repulsive nor criminally measurable. It is  
10 with such an act the case at bar is concerned.

11 The purity, honesty and fairness of the electoral  
12 process are compelling state interests. It is not difficult  
13 to recognize and punish bribery, but criminal acts such as  
14 bribery are not the only method of corrupting the process.  
15 It is easy and required to define a criminal act. It is,  
16 however, not so easy to define non-criminal corrupting acts  
17 if their existence is known and the putrefaction is  
18 recognized.

19 In an attempt to keep pure the electoral process  
20 in Kentucky the constitution in 1895 set certain standards  
21 -- this is in the constitution -- set certain standards to  
22 be addressed by legislation. The statutes as enacted,  
23 interpreted and applied apply even-handed regulation. The  
24 criminal is obvious and addressed by the indictment  
25 process. Other, non-criminal matters are regulated by

1 administrative agencies who monitor, not direct, conduct,  
2 compile information, and take steps to correct both civil  
3 and criminal violation. This is the state at work. This is  
4 state action directly involved in the electoral process. It  
5 directs reports to be filed, grants authorities to agencies,  
6 sets spending limits, requires listing of contributors,  
7 creates codes of conduct, holds hearings, assesses fines and  
8 penalties, initiates both civil and criminal action, issues  
9 guidelines and directives seeking the voiding of elections  
10 and other similar acts.

11 QUESTION: Mr. Chauvin.

12 MR. CHAUVIN: Yes, ma'am.

13 QUESTION: The literal language of the statute  
14 seems to say that no candidate shall promise to vote for or  
15 support any individual, thing or measure.

16 MR. CHAUVIN: Yes, ma'am.

17 QUESTION: Does that mean that under Kentucky law  
18 a candidate couldn't promise to support some particular  
19 proposal for legislative action?

20 MR. CHAUVIN: Justice O'Connor, under Kentucky law  
21 it's my interpretation of the statute that a candidate can  
22 promise to do or not do anything which is not illegal or  
23 constitutionally forbidden. In this case --

24 QUESTION: Has any Kentucky case affirmatively  
25 stated that proposition?

1 MR. CHAUVIN: Yes, ma'am.

2 QUESTION: Or do we rely only on the two older  
3 cases that were cited?

4 MR. CHAUVIN: The original case where the salary  
5 had not been set, that's the key to this case. The statute  
6 provides for the setting of the salary in May of the  
7 election year. The statute and the constitution of Kentucky  
8 say that a salary may not be scaled up or scaled down during  
9 the term. After May of the year of the election it is after  
10 that impossible and impermissible and constitutionally not  
11 permitted in Kentucky to change the salary; and that's the  
12 distinction.

13 Does that answer it?

14 QUESTION: What if he had promised here to refund  
15 the amount, \$3,000, to the state treasury?

16 MR. CHAUVIN: That is a practice for some people,  
17 to accept the funds and then give it away.

18 QUESTION: Well, give it to the state now. I'm  
19 talking about giving it back. The state treasury would  
20 benefit. It would be the same.

21 MR. CHAUVIN: I don't think there'd be any problem  
22 with him giving it back. I think it was the promise to not  
23 accept it. The treasurer of Jefferson County, Kentucky was  
24 compelled to cut a check.

25 QUESTION: That's a pretty thin line, don't you --



1 that distinction?

2 MR. CHAUVIN: Well, the line is not as thin as it  
3 sounds because there are acts which can be performed and  
4 those which can't be performed. This was an act which could  
5 not be performed under Kentucky law.

6 QUESTION: So that your statute goes to the  
7 impossible as well as to the illegal.

8 MR. CHAUVIN: Yes, sir.

9 QUESTION: There are those who say that President  
10 Reagan's promise to balance the budget is impossible. Would  
11 that be a violation of your Kentucky statute?

12 MR. CHAUVIN: No, sir.

13 QUESTION: Why not?

14 MR. CHAUVIN: No, sir. I think he said he'd give  
15 it his best shot, and at that time the budget was not set.  
16 There's nothing in the Constitution of the United States  
17 that says in May of the election year the budget is set, so  
18 he would not have crossed the line.

19 QUESTION: So, of course, none of your decisions  
20 have come right out and said that this statute is limited to  
21 barring promises to do something that's illegal or that are  
22 impossible. You extrapolate that from the two old cases,  
23 don't you?

24 MR. CHAUVIN: Yes, sir. They said it by  
25 implication, I think, when they talk about the salary has

1 been set, and the constitution says it can't be changed.

2 QUESTION: Of course, if the statute would purport  
3 to forbid a candidate from promising to support a reduction  
4 in taxes or I will support a measure limiting the real  
5 property taxes, or I will support a measure to increase  
6 state aid to local schools, and he's speaking to a group of  
7 local school boards.

8 MR. CHAUVIN: First Amendment. That's fully  
9 protected.

10 QUESTION: Well, if the statute purported to  
11 prevent that, that certainly is literally within the  
12 language of the statute.

13 MR. CHAUVIN: It would go too far.

14 QUESTION: And the whole statute then would be  
15 overbroad.

16 MR. CHAUVIN: No, sir. I don't think the whole  
17 statute rises or falls on this.

18 QUESTION: In a state court maybe it wouldn't but  
19 --

20 MR. CHAUVIN: The problem being that --

21 QUESTION: How about the overbreadth argument  
22 under the First Amendment?

23 MR. CHAUVIN: There's probably more merit to the  
24 overbreadth argument than to the First Amendment restraint.

25 QUESTION: Well, the overbreadth argument is a

1 First Amendment argument.

2 MR. CHAUVIN: Well, I don't see where the  
3 overbreadth argument is -- the threshold is the promising of  
4 an act impossible of legal fulfillment.

5 QUESTION: Well, I know. If you take that  
6 construction of the statute, why, that's another matter. So  
7 we have to make up our mind whether the Kentucky courts have  
8 construed the statute and put some limits to it.

9 MR. CHAUVIN: It has another value -- I'm sorry.

10 QUESTION: No, no. Go ahead.

11 MR. CHAUVIN: It has another value in that the  
12 penalty for the violation of this statute deserves some  
13 attention. It merely requires the rerunning of the  
14 election. This is a statute --

15 QUESTION: How much does that cost in Jefferson  
16 County?

17 MR. CHAUVIN: It could be expensive, but the  
18 purity of the electoral process is worth it.

19 QUESTION: Mr. Chauvin, you've gone a little past  
20 my point, but is there any law in Kentucky that says you  
21 must take your salary?

22 MR. CHAUVIN: Yes, sir. The statute -- I would  
23 say, Mr. Justice, there is no --

24 QUESTION: You mean that if I'm an officer of  
25 Kentucky I can't just take the check and throw it away?

1           MR. CHAUVIN: Well, you could do that or you could  
2 contribute it to a charity.

3           QUESTION: Well, can I promise to do that?

4           MR. CHAUVIN: No, sir.

5           QUESTION: Why not?

6           MR. CHAUVIN: Because --

7           QUESTION: It's not illegal.

8           MR. CHAUVIN: It --

9           QUESTION: You said it's not illegal.

10          MR. CHAUVIN: It's not illegal. You could promise  
11 that.

12          QUESTION: Pardon?

13          MR. CHAUVIN: You could promise that.

14          QUESTION: You could promise that.

15          MR. CHAUVIN: But you could not promise to serve  
16 for nothing.

17          QUESTION: Well, if I promise to take the check  
18 and throw it in the wastecan, am I not serving for nothing?

19          MR. CHAUVIN: Pretty close.

20          QUESTION: Pretty close? That's about even, isn't  
21 it?

22          MR. CHAUVIN: But you did not violate the  
23 statute. It is possible for you to do that, Mr. Justice.

24          QUESTION: Does not some of this colloquy suggest  
25 that, using the language out of the Connally case that men



1 of common intelligence must necessarily guess at its  
2 meaning, the meaning of this statute, does that have  
3 something to do with its vagueness?

4 MR. CHAUVIN: It has something to do with the  
5 vagueness potential, but it has the same as the 434(e) of  
6 the Election Act of 1971 when this Court had a problem over  
7 who was required to report. The statute merely said all of  
8 those who spend money on behalf of a candidate shall report  
9 it. In 434(e) there was a great problem for vagueness, but  
10 the Court looked at the overall purpose of the statute and  
11 interpreted the two classes required to report and narrowed  
12 it.

13 QUESTION: Mr. Chauvin.

14 MR. CHAUVIN: Yes, sir.

15 QUESTION: This illegal, did you know there's  
16 considerable controversy whether the extension of the time  
17 within which to ratify the Equal Rights Amendment is legal  
18 or not. Indeed, a court said it is not. Could a candidate  
19 for the legislature in Kentucky -- I don't know whether  
20 Kentucky has ratified or not -- suppose not, could he run  
21 and promise that if elected he'd vote to ratify the ERA?

22 MR. CHAUVIN: To answer your first question,  
23 Kentucky's done it both ways, passed it and repealed it.  
24 But I think that there is --

25 QUESTION: Well, would he have to guess whether

1 the extension was legal or illegal?

2 MR. CHAUVIN: I don't think it would reach him. I  
3 think we're talking about something much narrower here.

4 QUESTION: Well, how narrow?

5 MR. CHAUVIN: Narrow to the point that if it is a  
6 constitutional infirmative or impossibility in Kentucky,  
7 then that's the line. I don't think it would be  
8 constitutionally impossible in Kentucky. In fact, it  
9 happened that it was passed and then the approval was set  
10 aside.

11 QUESTION: Was this during the extended period?

12 MR. CHAUVIN: Yes, sir.

13 QUESTION: Counsel?

14 MR. CHAUVIN: Yes, sir.

15 QUESTION: You've stated that it would be  
16 perfectly appropriate under Kentucky law to receive the  
17 salary and then give it away. Wasn't that precisely the  
18 question before the Supreme Court of Kentucky in Boggs: the  
19 people who ran there promised to give it to the Little  
20 League and religious purposes?

21 MR. CHAUVIN: The issue would be whether or not it  
22 had been set at that point. I think that was it in that  
23 case. They were making pronouncements of what they would do  
24 with it before they got it.

25 QUESTION: But if they received it, I understood

1 you to say that that would meet that objection.

2 MR. CHAUVIN: The disposition of funds is a right  
3 for anybody to do with as he or she chooses.

4 QUESTION: But did the Kentucky court say that in  
5 Boggs? It said you couldn't receive money and give it away?

6 MR. CHAUVIN: The Kentucky court said I believe in  
7 that case, Mr. Justice, that the salary had already been set.

8 QUESTION: The salary had been set but --

9 MR. CHAUVIN: That was a violation of it.

10 QUESTION: So that's the distinction. If a  
11 salary's been set, you can give it away.

12 MR. CHAUVIN: Yes, sir. It happens. The present  
13 Governor gives his salary away.

14 QUESTION: So you not only can't receive it, but  
15 you can't give it away if the salary has been set.

16 MR. CHAUVIN: It presents a situation that injects  
17 into the political process the opportunity for someone to  
18 say I will serve for nothing; and they ask the other  
19 candidate will you serve for nothing, and he says no, I  
20 can't serve for nothing; I need the money. The implication  
21 is there that Candidate 2 isn't as interested in the job as  
22 Candidate 1 because he just wants the money.

23 QUESTION: But are you still saying that in some  
24 circumstances a candidate may give his entire salary away?

25 MR. CHAUVIN: Yes, sir. I think at one time

1 Senator Kerr and Senator Green used to distribute their  
2 salary among their staffs.

3 QUESTION: But they didn't come from Kentucky.

4 MR. CHAUVIN: No, sir. But I say that practice is  
5 familiar, to give it to an assistant or give it to someone  
6 else.

7 QUESTION: May I ask you a question kind of from a  
8 different angle? Is it rather clear on this record that  
9 this person could not have been convicted of a crime because  
10 he didn't realize at the time that his statement was  
11 inaccurate. And in a way he loses the election because of  
12 the inaccuracy, an unintended inaccuracy in his statement.

13 Would it be appropriate to judge the First  
14 Amendment question by the New York Times standard of when he  
15 did not know it was unlawful or inaccurate and was not in  
16 reckless disregard for the truth, it's somehow wrong to  
17 punish him for an innocent falsehood.

18 MR. CHAUVIN: I would say that if the statute --  
19 that is a valid distinction with this concern. This  
20 particular statute which is before the Court reserves to a  
21 candidate the right to bring this action, and if a candidate  
22 made --

23 QUESTION: There's always an interested candidate  
24 on the other --

25 MR. CHAUVIN: But not the state.



1 QUESTION: Pardon me?

2 MR. CHAUVIN: Not the state.

3 QUESTION: I mean it's almost as though he had  
4 slandered his opponent. That's really what gave me the  
5 thought, that there's really quite an analogy to a libel or  
6 slander case because the one person who's hurt by this  
7 innocent false statement is his opposing candidate. And if  
8 this were treated as slander under your law, it clearly  
9 would not be permissible as a matter of First Amendment law.  
10 And is it not correct that really the heart of the  
11 wrong here is the inaccuracy in the statement?

12 MR. CHAUVIN: The inaccuracy and the impossibility  
13 of the performance.

14 QUESTION: Well, but he didn't realize it at the  
15 time, and as soon as he did he made a public disclaimer of  
16 any --

17 MR. CHAUVIN: I had problems -- I wasn't in the  
18 case at the trial level.

19 QUESTION: I understand.

20 MR. CHAUVIN: I had problems with this being  
21 called a retraction. If you read that second statement, I'm  
22 not sure at all that that was a retraction. I pointed that  
23 out in my brief. It was a restatement, but no one could  
24 object to the second because there was nothing in it other  
25 than to say I --

1 QUESTION: But whether the retraction was  
2 effective or not, the record is clear that he did not  
3 intentionally mislead or --

4 MR. CHAUVIN: Well, I think that's right.

5 QUESTION: I think that's a fair --

6 MR. CHAUVIN: I think that's true.

7 QUESTION: Well, if it was a retraction, you'd be  
8 making the same argument, wouldn't you?

9 MR. CHAUVIN: Sir?

10 QUESTION: If it had been a class A-1 retraction,  
11 you still would be making your same argument.

12 MR. CHAUVIN: I would not be --

13 QUESTION: Wouldn't you?

14 MR. CHAUVIN: Sir?

15 QUESTION: Wouldn't you?

16 MR. CHAUVIN: No, sir. I wouldn't be. The  
17 problem that bothers me --

18 QUESTION: So you think a retraction would correct  
19 this.

20 MR. CHAUVIN: The state statute does not give  
21 retraction as a defense, just as in Arnett v. Kennedy, the  
22 case where the non-probationary federal employee could be  
23 fired "for the good of the Service." And the person who did  
24 the firing could sit as a hearing officer. And this Court  
25 said that it might well have been better if Congress had

1 done it some other way, but the fact is it didn't. And  
2 since it didn't, it was a matter which addressed itself to  
3 congressional correction.

4           This statute could perhaps be more tolerable if  
5 the defenses which were available of retraction and not  
6 retreating from it, those five reasons the trial judge gave,  
7 if the legislature of Kentucky were to make these defenses  
8 in this type action.

9           QUESTION: You don't think that's a little  
10 overbroad, a little, just a little?

11          MR. CHAUVIN: Got a shot at it.

12          QUESTION: Pardon?

13          MR. CHAUVIN: The overbreadth question has  
14 concerned me as I did this brief more than the First  
15 Amendment, because I think the First Amendment, there's no  
16 question under given circumstances such as these that the  
17 First Amendment would be regulating. The question is  
18 whether or not it could include legal as well as illegal and  
19 thus chill the statement. That's the question.

20          QUESTION: Going back to this matter I raised  
21 before, I have I think correctly observed that in each  
22 argument, your friend's argument and yours, you each, with  
23 respect to questions, changed your -- after reflection  
24 changed your response.

25          Now, I don't suggest that as a criticism because

1 at that lectern I have changed my responses to the Court at  
2 times, sometimes change my mind here; but going back to this  
3 matter of the standard, whether men of reasonable -- and  
4 they'd better change that -- men and women of common  
5 intelligence must necessarily guess at the meaning, doesn't  
6 this colloquy and the matter of changing responses suggest  
7 that no reasonable person would know whether he or she was  
8 in violation of this Kentucky statute?

9 MR. CHAUVIN: Mr. Chief Justice, that is a valid  
10 observation on many statutes, this one not the least of  
11 which. But what malice aforethought, wanton reckless  
12 disregard.

13 The problem of this, as I have viewed this case,  
14 the problem of this case is that there are, as the Court  
15 said in Arnett v. Kennedy, limitations on what you can do to  
16 define acts in a statute. And I submit to the Court this  
17 morning in all candor and all honesty that not only the  
18 English language but Spanish, German, French, Italian,  
19 Chinese, Japanese and Korean together are incapable of  
20 describing the possible acts of an election in Kentucky. It  
21 just can't be done, to make a list of the possible  
22 violations which people can come up with.

23 And the highest court of Kentucky has limited and  
24 given candidates all the rights in the world -- and I  
25 subscribe to it in my brief and this morning -- to a full,



1 free, rancorous, acrimonious debate, limited only, however,  
2 to acts which are legally impossible to perform.

3 QUESTION: Mr. Chauvin.

4 MR. CHAUVIN: Yes, ma'am.

5 QUESTION: Would a promise by a candidate to vote  
6 for a reduction in taxes pro tanto be an illegal promise  
7 under the Kentucky statute?

8 MR. CHAUVIN: Justice O'Connor, if the rate had  
9 not been set, the candidate could well do that. The  
10 violation in this case is that in August when this statement  
11 was made, the action which forbade it had already taken  
12 place.

13 QUESTION: No. Just a blanket promise that if  
14 elected I will vote for a pro tanto reduction in taxes.

15 MR. CHAUVIN: No, ma'am, that's not a violation.

16 QUESTION: Why then does the Kentucky court rely  
17 on that in its opinions as a justification for holding it  
18 invalid?

19 MR. CHAUVIN: I read that in the case, but I did  
20 not think of that as an overriding reason the Kentucky court  
21 -- I think it was one of the reasons, but not the overriding  
22 reason that that case held that.

23 QUESTION: Because if that would not be invalid,  
24 then I wonder whether the Kentucky courts have limited the  
25 application of the statute as you have suggested.

1           MR. CHAUVIN: In the first case the petition was  
2 dismissed, the highest court saying there's nothing wrong  
3 with what the candidate said because the salary hadn't been  
4 set. It was not an impossibility.

5           QUESTION: Mr. Chauvin, may I ask another  
6 question? This is limited, as I understand it, to campaign  
7 promises that are legally impossible to perform. Normally  
8 in the free speech area we rely somewhat on the free market  
9 idea that you combat falsehood by allowing the  
10 countervailing statement to be made and considered.

11           It seems to me that this would be the easiest sort  
12 of misstatement to refute. Why can't the opponent simply  
13 say my opponent's promise is legally impossible to perform;  
14 this demonstrates he's not qualified for office; and so  
15 forth and so on?

16           Why isn't that an adequate remedy instead of  
17 saying he can't even make the statement in the first place?

18           MR. CHAUVIN: I think the voters are entitled to  
19 more protection than that. I would say that with all  
20 respect to the --

21           QUESTION: The voters in Kentucky are not capable  
22 of evaluating these competing arguments?

23           MR. CHAUVIN: Well, in some places the salary is  
24 not the great attraction to the office.

25           QUESTION: No, but the question whether the man

1 knows the duties of the office sufficiently well to make  
2 reckless promises that are legally impossible to perform is  
3 something that ought to be relevant in the context.

4 MR. CHAUVIN: I think that that could be pointed  
5 out, but I think also that --

6 QUESTION: And you're suggesting that pointing it  
7 out isn't enough because the public might be deceived by it.

8 MR. CHAUVIN: I think that tends to corrupt the --

9 QUESTION: And in addition, they're not worried  
10 about any place but Louisville, so all the other voters are  
11 smart, but the Louisville ones are not.

12 MR. CHAUVIN: No. This is the first one that has  
13 come up in Louisville.

14 QUESTION: Well, there's no other one that can  
15 come up. Jefferson County's the only one.

16 MR. CHAUVIN: But I say that cases have come up  
17 from other counties around the state.

18 QUESTION: On this statute?

19 MR. CHAUVIN: No, sir. On this same statute,  
20 yes. The candidates from up in northern Kentucky who said  
21 they'd pool the salary and hire a city manager. They said  
22 you can't do that. There's no provision in the law for a  
23 city manager, and besides that, you can't pull your  
24 salaries. That was up in northern Kentucky. Over in  
25 eastern Kentucky the tax assessor said -- he'd been tax

1 assessor before and said when I was tax assessor before you  
2 didn't pay taxes on certain things. Remember that when you  
3 vote for me this time. The Court of Appeals of Kentucky at  
4 that time said no, you can only exempt from taxation matters  
5 which the Constitution allows you to exempt, and it's  
6 impossible for you to do this.

7 QUESTION: But don't you get in trouble if you try  
8 to enforce a rule that every politician must tell nothing  
9 but the truth?

10 (Laughter.)

11 MR. CHAUVIN: I'd say you sure had a big field out  
12 there to work on. It's the impossibility, though, that  
13 makes it an interest, a compelling state interest.

14 QUESTION: Well, I have yet to hear a politician  
15 who doesn't say I will do two things: I will cut taxes, and  
16 I will raise expenditures. Well, that certainly is  
17 impossible.

18 MR. CHAUVIN: Hopeful

19 But I think this matter can be corrected, if it  
20 deserves correction, by the legislature of Kentucky. The  
21 whole problem with this case was that the defenses available  
22 in one statute were not available in this one. It might  
23 have been better often if Congress or state legislatures had  
24 done things differently. In this case it didn't happen.  
25 This is a legitimate state interest to protect this



1 compelling interest in which the Commonwealth of Kentucky  
2 has an important and measurable interest, and it can be and  
3 should be, if necessary, corrected by legislation.

4 I would be the last to limit anyone's First  
5 Amendment rights. I do not think this statute as applied  
6 and narrowed by the courts of Kentucky puts any chill or any  
7 untold or untoward effect on any candidate in Kentucky.  
8 It's seldom you can deal with a statute that says you can do  
9 everything but one. That's basically what these cases have  
10 said, that nothing is proscribed except that which is  
11 illegal and constitutionally impossible.

12 I think that it is and would urge the Court, as  
13 the lower courts have, that this is a valid assertion by the  
14 state legislature of the interest of the Commonwealth of  
15 Kentucky and its electoral process. This was not a statute  
16 which was hastily contrived to defeat some purpose that the  
17 legislature found distasteful. The legislature passed this  
18 act almost word for word because the constitution commanded  
19 it to do it; and it is with that compelling purpose, that  
20 weighty, important reason, that the Kentucky court should be  
21 sustained.

22 Thank you.

23 CHIEF JUSTICE BURGER: Do you have anything  
24 further, Mr. Goldberg?

25 MR. GOLDBERG: I'll waive any comment, if the

1 Court please.

2 CHIEF JUSTICE BURGER: Thank you, gentlemen.

3 The case is submitted.

4 (Whereupon, at 10:59 p.m., the case in the  
5 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Carl W. Brown, Petitioner v. Earl J. Hartlage

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BY Sharon Lynn Connelly

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