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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: MARCH FONG EU, SECRETARY OF STATE OF CALIFORNIA,
ET AL., Appellants V. SAN FRANCISCO COUNTY
DEMOCRATIC CENTRAL COMMITTEE, ET AL.

CASE NO: 87-1269

PLACE: WASHINGTON, D.C.

DATE: December 5, 1988

PAGES: 1 thru 43

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IN THE SUPREME COURT OF THE UNITED STATES

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MARCH FONG EU, SECRETARY OF :
STATE OF CALIFORNIA, ET AL., :
Appellants :

v. :

No. 87-1269

SAN FRANCISCO COUNTY DEMOCRATIC :
CENTRAL COMMITTEE, ET AL. :

-----x

Washington, D.C.

Monday, December 5, 1968

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:48 o'clock p.m.

APPEARANCES:

GEOFFREY LLOYD GRAYBILL, ESQ., Deputy Attorney General
of California, Sacramento, California; on behalf of
the Appellants.

JAMES G. BROSNAHAN, ESQ., San Francisco, California; on
behalf of the Appellees.

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P R O C E E D I N G S

(1:48 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1269, March Fong Eu v. San Francisco County Democratic Central Committee.

QUESTION: You may proceed, Mr. Graybill.

ORAL ARGUMENT OF GEOFFREY LLOYD GRAYBILL

ON BEHALF OF THE APPELLANTS

MR. GRAYBILL: Thank you, Justice Brennan, and may it please the Court:

This case is here on appeal from a judgment of the Ninth Circuit after remand from this Court for reconsideration in light of its decision last term in *Tashjian v. the Republican Party of Connecticut*. The primary question presented is whether California can, consistent with the First Amendment, protect the right of members of a state political party to control their party through their votes in the primary election conducted and financed by the state.

One of the challenged statutes enables party members to use the primary election to choose democratically the candidates who have the endorsement of the party in the general election for partisan office, and another set of challenged statutes enables the endorsed candidates as the chosen representatives of

1 the party to be members of the party State Central
2 Committee.

3 And this afternoon I'd like to address two
4 general points. The first is that the invalidated
5 statutes promote strong and fundamental California
6 interests in establishing a thoroughly open and
7 democratic process for selecting its public officials;
8 and the separate but related interest of establishing
9 government which is stable and has the acceptance of its
10 citizens. And the final interest is in the prevention
11 of fraud.

12 And the second general notion that we'd like
13 to address is that on the record below, the invalidation
14 of the statutes violates this Court's admonition,
15 repeated most recently in Tashjian, that a court should
16 not interfere with the First Amendment rights, the
17 expression of First Amendment rights merely because it
18 believes them to be unwise or irrational.

19 Now, California's overriding and fundamental
20 interest in these statutes is in an open and democratic
21 system of selecting its government officials, and this
22 interest reflects the evolution of values manifested by
23 the amendments to the United States Constitution and
24 decisions of this Court and of California's own
25 constitution which expand the franchise and permit more

1 direct participation by the citizens of this country in
2 the selection of their officers and the determination of
3 policy. Some of those constitutional amendments that
4 reflect this value are the elimination of the
5 disenfranchise of black persons in this country by the
6 Fifteenth Amendment, the direct election of United
7 States Senators and the extension of the vote to women.

8 And court -- decisions of this Court of a
9 general nature which reflect this are the decisions
10 affecting one person, on vote and the restrictions on
11 gerrymandering.

12 And the California constitution --

13 QUESTION: Excuse me. I don't understand what
14 this has to do with preventing a party central committee
15 from making a recommendation to the party membership.

16 MR. GRAYBILL: The -- Justice Scalia, it does
17 not prevent the members of the committee from
18 communicating with their party. What it does is protect
19 to the members of the party the right to participate
20 directly in the choice of candidates without having
21 that --

22 QUESTION: Well, couldn't they participate
23 with the recommendation as well? I mean, they are just
24 talking about the right to know what the recommendation
25 of the committee as a committee is. Then they'll be

1 able to accept it or reject it.

2 why is that undemocratic?

3 MR. GRAYBILL: Well, Justice Scalia, the
4 choice, the representation being made on behalf of the
5 committee is typically that this is the party's
6 candidate, and the effect that that can often have is
7 that the choices available to the rest of the members of
8 the party in the primary election are restricted.

9 We have a phenomenon in California that's
10 caused a great deal of irritation, the election returns
11 on the national level are reported before our polls
12 close, and it's been established by objective evidence
13 that that affects the turnout in elections. And we
14 don't get the participation of as many citizens in our
15 election process when they think that their options have
16 been foreclosed, that it's over.

17 QUESTION: Well, that's another case. You
18 don't want this case to hinge on whether it would be
19 constitutional to prevent election returns from being
20 announced in California, assuming that they are
21 available?

22 MR. GRAYBILL: No, Justice Scalia. What we
23 are attempting to demonstrate by that analogy is that
24 the tendency for an endorsement by what purports to be
25 the party, and in California in fact is not the party,

1 the party expresses itself in the primary election.
2 That's what the primary election system is all about.
3 The party leaders --

4 QUESTION: It's one thing to outlaw the
5 smoke-filled room and it's another thing to prevent me
6 from knowing what the people in the smoke-filled room
7 would recommend.

8 Isn't that something quite different?

9 MR. GRAYBILL: That doesn't prevent you,
10 Justice Scalia, from knowing what the people in the
11 smoke-filled room recommend. They have other means of
12 access through, for example, membership in the
13 California Democratic Council, our declarant, Senator
14 Rodda, indicated any number of unofficial groups of
15 party that get together and make their views known to
16 the electorate. This restriction is so minuscule with
17 regard to the First Amendment rights of the individual
18 members of the executive committees or the county
19 central committees or the State Central Committees, the
20 means available to them other than creating the false
21 impression that they speak for the party are readily
22 available.

23 QUESTION: So you're saying we should validate
24 it because it isn't needed? I don't understand that.

25 You say it's minuscule, you can find out other

1 ways, so it's really not important.

2 MR. GRAYBILL: Well, it is important, Justice
3 Kennedy.

4 QUESTION: And so you're here at the Supreme
5 Court to defend it because it's not important? I don't
6 understand that.

7 MR. GRAYBILL: Well, that is definitely not
8 the case, and the reason it is important is that in
9 California, in the direct primary system, the party, per
10 se, speaks by its vote in the primary election.

11 When an official organ of the party, which
12 under the charter of the party, which is reflected in
13 these statutes, precludes them from making those
14 endorsements, you have not only the mandate of the party
15 that created these committees that these committees not
16 try to speak for the party or to restrict the numbers of
17 candidates and options available to the party in the
18 primary election is a justifiable and overriding state
19 interest, and it is narrowly construed to -- it is
20 narrowly fashioned not to infringe on the First
21 Amendment rights of individual party leaders to express
22 their views.

23 They are just restricted from committing the
24 fraud that exists by virtue of the existence of the
25 California Democratic -- the California primary election

1 system. The parties speak at the primary with regard to
2 who their endorsed candidates are to be for the general
3 election and who the party leadership is to be.

4 QUESTION: Didn't the party, the Democratic
5 Party, change its by-laws or requirements after the
6 Ninth Circuit acted here to permit pre-primary
7 endorsements by the committee?

8 MR. GRAYBILL: Justice O'Connor, I think we
9 should be more precise there. The executive board of
10 the State Central Committee of the Democratic Party, by
11 a vote which is not clear but could have been as few as
12 32 out of over 1000 members, decided that matter. They
13 did not present it to a vote of the full committee as
14 was the case in Tashjian, and we really don't know what
15 the position of the party is on that.

16 I don't think that would be a fair
17 reflection --

18 QUESTION: Excuse me. Was it an effective
19 vote? Are you denying that it was an effective vote,
20 binding on the committee?

21 MR. GRAYBILL: Under the by-laws, Justice
22 Scalia, as we understand them of the State Central
23 Committee, that would be permissible, yes.

24 QUESTION: It was permissible. So once again
25 you're, you're trying to impose upon the party some

1 other rule about what, what the -- how the party takes
2 action. If the Democratic Party of California says 32
3 votes does it in those circumstances, 32 votes does it,
4 and you're coming and tell us that it doesn't do it?

5 MR. GRAYBILL: No, Your Honor. what we are
6 explicating here is that does not reflect the will of
7 the party necessarily. There is a process that has been
8 gone through to establish these reforms through the
9 political process. In other words, interest in the
10 parties, one of their parties organized through the
11 direct primary system, the progressives, the much
12 maligned progressives, they established those things in
13 statute. The members of the party here that disagree
14 have been unsuccessful in persuading their parties in
15 general, and I think we have to look here that the
16 organization of a party is not the party, per se. There
17 are other elements to it.

18 There are the, the members of the party
19 elected to the official positions in state government
20 and in the national legislature --

21 QUESTION: Including those who voted for this
22 bill. Weren't they all party people?

23 MR. GRAYBILL: You mean the by-laws?

24 QUESTION: Weren't they all party people in
25 the legislature?

1 MR. GRAYBILL: Are you referring to the by-law
2 change or some legislation, Justice Marshall?

3 QUESTION: The law involved in this case
4 passed by the legislature of California, which
5 legislature was composed of politicians.

6 Do you agree to that?

7 MR. GRAYBILL: Well, I think that that's
8 correct, Justice Marshall. I think we're, we're dealing
9 with politicians throughout this lawsuit.

10 The overriding interest that California has in
11 imposing this kind of minimal restriction on the speech
12 of an entity as opposed --

13 QUESTION: How can you say it's a minimal
14 restriction. It's a, it's a core right to express views
15 in the political arena. I mean, I just, I really don't
16 understand your terminology.

17 MR. GRAYBILL: Justice O'Connor, the committee
18 purports to speak for those, for others that are not
19 members of the committee and that they were elected --

20 QUESTION: Well, if the party mechanism
21 permits the committee to express its views, for whatever
22 it's worth, how can that be some minimal right?

23 MR. GRAYBILL: Justice O'Connor, it would
24 still remain our contention at this point that the
25 change in the by-laws is not necessarily reflective of

1 the will of the party. It appears -- and we have to
2 acknowledge that under the circumstances that this case
3 has gotten here, the record isn't as complete as we
4 would like, but we believe that the mechanism of a
5 change in the by-laws and a submission to the
6 legislature which determines -- these are people that
7 were nominated by members of the party in the primary
8 election and elected -- make a determination of whether
9 this really is reflective of the will of the party.

10 And there is an example --

11 QUESTION: Well, what was the will of the
12 party before the amendment?

13 MR. GRAYBILL: The amendment to the by-laws,
14 Justice White?

15 The will of the party, we believe, was
16 reflected in the statute because this process --

17 QUESTION: That's a real bootstrap, isn't it?

18 MR. GRAYBILL: Well, perhaps, but --

19 QUESTION: I mean, if the by-laws were wholly
20 silent, they certainly didn't forbid endorsing
21 candidates.

22 MR. GRAYBILL: Well, Justice White --

23 QUESTION: It still was just as much of a,
24 just as much of a restriction on the speech, no matter
25 what the by-laws said, unless the by-laws absolutely

1 forbade it, which it didn't -- they didn't.

2 MR. GRAYBILL: Your Honor, we have referred in
3 the record and established in the record, and I don't
4 think it's rebutted here, that the political culture of
5 California, the expression of First Amendment rights by
6 the parties themselves indicates that they don't want
7 their institutions making endorsements, and this goes
8 back before the advent of the primary election system.
9 This was the way Californians did business in the
10 convention era, as was reflected in the opinion of the
11 Attorney General --

12 QUESTION: Well, apparently the county and
13 State Central Committees -- who brought this lawsuit?

14 MR. GRAYBILL: Well, there are three parties
15 affected in this, political parties.

16 QUESTION: Well, there, at least there are
17 some county or State Central Committees that want
18 endorsements.

19 MR. GRAYBILL: There are no Republican Central
20 Committees that want to endorse --

21 QUESTION: How about the Libertarian Party?
22 Are they on the primary ballot in California?

23 MR. GRAYBILL: Yes, I believe they are,
24 Justice O'Connor.

25 QUESTION: Do they permit pre-primary

1 endorsements?

2 MR. GRAYBILL: Do their by-laws prevent
3 pre-primary --

4 QUESTION: Does that party permit pre-primary
5 endorsements?

6 MR. GRAYBILL: Your Honor, the only indication
7 in the record below is that they do not, they have not,
8 in fact, made those endorsements since they've become a
9 ballot-qualified party.

10 QUESTION: Well, because they had to change
11 their whole system once they became ballot-qualified.
12 They also changed their whole manner of electing
13 delegates and went to a county system instead of a
14 regional system, right? I mean, that doesn't prove
15 anything. It just proves that they've been obeying the
16 law.

17 MR. GRAYBILL: Well, Justice Scalia, there is
18 nothing in the record below that indicates that the
19 Libertarian Party requested to be exempted from the ban
20 on endorsements. That's nothing below, outside of the
21 fact that the state --

22 QUESTION: To be exempt, how do you request to
23 be exempted, I mean? Is this the way you do things in
24 California, there's a law and you just go and ask for an
25 exemption?

1 QUESTION: Sure.

2 QUESTION: Or is there a special procedure to
3 get an exemption from this?

4 MR. GRAYBILL: There are amendments to laws
5 submitted to the legislature every session, Justice
6 Scalia, and this would be one of them. This is
7 traditionally the way that the parties, especially the
8 Democratic and Republican Parties in California, have
9 done business.

10 QUESTION: Oh, you think the Libertarian Party
11 is in the same position in California, just go to a
12 friendly legislature and say we want to do something
13 that we think will make us a more effective party.

14 MR. GRAYBILL: And there's nothing in the
15 record, Justice Scalia, that indicates they went to the
16 legislature to request any kind of an exemption from
17 that ban; every indication, when you look at their
18 by-laws, their -- it's true, there's no mention one way
19 or the other with respect to the ban on endorsements,
20 but they in fact did not, and there would have been
21 nothing to prevent them from having unofficial groups
22 such as within the -- historically within the Democratic
23 Party, there's the California Democratic Council, and
24 within the Republican Party the California Republican
25 Assembly, which --

1 QUESTION: [Inaudible] -- would they have to
2 get an exemption from or an exception or whatever it is,
3 from the ban on endorsing candidates? Where would they
4 have to go to get that?

5 MR. GRAYBILL: They would go to the
6 legislature, Justice Brennan. Or they could use the
7 initiative process. And --

8 QUESTION: And that's true, is it, also, of
9 the provision of the statute, as I understand, that
10 specifies the membership of the State Central Committee?

11 MR. GRAYBILL: That's correct, Your Honor.

12 QUESTION: You'd have to go to the legislature
13 to get an exception from that, too?

14 MR. GRAYBILL: That's correct. But --

15 QUESTION: And the provision fixing the term
16 of office of the State Committee chairs, that's in the
17 statute, isn't it?

18 MR. GRAYBILL: Yes, it is, Justice Brennan.

19 QUESTION: And there, too, they'd have to get
20 an exception from the legislature, is that it?

21 MR. GRAYBILL: That's true. But, Justice
22 Brennan, one of the things that we'd like to point out
23 to the Court --

24 QUESTION: Forgive me for --

25 MR. GRAYBILL: Yes.

1 QUESTION: You do agree that each of those
2 prohibitions raises a First Amendment question, don't
3 you, either speech or association or both?

4 MR. GRAYBILL: Your Honor, they may raise
5 them, but they do not establish a substantial
6 infringement of those interests.

7 QUESTION: I know that. I know that's your
8 position, but I just wanted to be clear. It's all four
9 of those that you say implicate the First Amendment.

10 MR. GRAYBILL: I believe they do, Justice
11 Brennan.

12 Our, our position is that the political
13 parties -- and I believe this is the primary elec -- the
14 election of party officials and the endorsed candidates
15 of the parties are affected in the primary election,
16 which is an integral part of the state's election
17 process, and the importance to the state of assuring
18 that those institutions that participate, do participate
19 in a democratic manner and enable the grass roots to
20 make direct input without being restricted by party
21 organizations, machines, bosses, and smoke-filled rooms
22 is a very deep-seated tradition in California. It's one
23 that has been expressed by the members of the parties
24 themselves. That is a First Amendment right.

25 QUESTION: [Inaudible] -- parties to endorse.

1 Any party that doesn't want to endorse just won't
2 endorse. If that's good for the party and good for the
3 public interest, they just won't endorse.

4 MR. GRAYBILL: Well, Justice White, I think we
5 have to look at who decides for the party, the members
6 of the party or some organization that, or group,
7 special interest, that manages to collect 32 votes on
8 the executive board and not allow that matter to come up
9 for a vote of the full committee.

10 QUESTION: Well, somebody else can organize a
11 vote of 45 members and overrule that.

12 MR. GRAYBILL: I think in the circumstances of
13 this case, Your Honor, the opportunity was in January of
14 this year, and the convention occurred in March.
15 There's, as I understand it, under the rules there would
16 be no opportunity for anybody to override in those
17 circumstances.

18 What should happen is that these by-laws would
19 go to the legislature and they would be evaluated by
20 members of the party who would determine whether it does
21 in fact reflect --

22 QUESTION: I know, but all, all the 32 members
23 managed to get done is that they said that there may be
24 endorsements. It didn't force anybody to endorse. No
25 county commission has to endorse. The State Committee

1 doesn't have to endorse. There's just a permission now,
2 is that it?

3 MR. GRAYBILL: Well, Your Honor, I believe
4 that there was a system for making these endorsements
5 that the party chair made sure went forward.

6 QUESTION: Well, a system, but did every, did
7 every county central committee have to make endorsements
8 under that by-law? They didn't need to?

9 MR. GRAYBILL: Justice White, they're not
10 permitted to as county central committees, per se.
11 There is a regional system, so the Plaintiffs before
12 this Court --

13 QUESTION: Well, regional then.

14 MR. GRAYBILL: -- still do not have the
15 permission of their parties to make endorsements. They
16 are precluded, and if we're to take the action of the
17 parties, the action of the State Central Committees as
18 being reflective of the will of the party, then these
19 plaintiffs have not shown a substantial infringement on
20 their rights by the restriction of this statute because
21 they are --

22 QUESTION: If those party central committees
23 had voted differently, they would have been voting to
24 violate the law, right? So you're saying that the fact
25 that the parties have not put into effect a mechanism

1 that violates the law proves that the parties don't want
2 it, is that what you're saying?

3 MR. GRAYBILL: Justice Scalia, Justice Scalia,
4 at any time during the course of this litigation, a
5 party could have passed by-laws. The passing of by-laws
6 that says we want the right to endorse, and this is how
7 we're going to do it, does not violate any statute that
8 is before this Court.

9 QUESTION: It's only implementing them.

10 MR. GRAYBILL: Well, its --

11 QUESTION: You're suggesting that they should
12 have adopted by-laws that they knew could not be
13 implemented because they'd be unlawful.

14 MR. GRAYBILL: Well, the way the parties have
15 done business is, it appears, is that that is what
16 happens. There is a decision by the organization, and
17 it goes to the legislature, and the delegation -- and
18 there's a comity relationship in the state legislature
19 which we have established in the record through Senator
20 Rodda's declaration that one party historically and
21 consistently has not interfered with the way another
22 party wants to organize itself, and this ban on
23 endorsements has been the consistent policy for over 75
24 years of both the Democratic and Republican Parties in
25 California, and there's nothing that in light of that

1 history and the way parties evolve their policies that
2 indicates that an overnight action by a rump group
3 within the parties reflects that seismic change in the
4 will of the party.

5 And the state --

6 QUESTION: Well, it's hardly surprising that
7 the parties haven't taken a contrary view when state law
8 prohibited it.

9 MR. GRAYBILL: Justice O'Connor, there is
10 nothing in these statutes that precludes them from
11 expressing their will. At any time during the course of
12 this litigation there could have been a resolution
13 submitted to the full central committees. This is the
14 sense of it.

15 It's strange that that never happened, to get
16 an expression of the will of the parties. That was
17 pointedly not done. It was kept close, in a small group
18 within the executive board, and I think the indications
19 in the record are that -- there's no indication of how
20 many members of the executive board actually were in
21 attendance and had an opportunity to vote. All we know
22 is that the bare minimum effected that during the course
23 of this litigation.

24 And any time during those four years that this
25 litigation has pended there could have -- there was a

1 ground swell within the party that would have occurred
2 with regard to resolutions in the central committees,
3 and I think the members of the legislature, being
4 sensitive to what's happening in their parties, would
5 very well have changed that. That has been the way it
6 has been. I think this Court has recognized in Anderson
7 v. Celebrezze and other cases that the election laws in
8 the states are primarily the handiwork of the major
9 parties, and in California there is this tradition of
10 comity which enables each of the major parties to impact
11 what occurs with them.

12 And the record reflects an entire tradition in
13 California that the people, the members of the parties
14 want the say as to who the endorsed candidates are left
15 in their hands in the primary election.

16 QUESTION: Well, your entire argument so far,
17 it seems to me, is just that, well, really, this is just
18 sort of a tempest in a teapot, that there really is no,
19 no substantial restriction at all here imposed, imposed
20 on the parties, that they really want this --

21 MR. GRAYBILL: On the parties --

22 QUESTION: -- and always have acted this way,
23 so there's really no real restriction.

24 Is that, is that your argument?

25 MR. GRAYBILL: That's, that's part of it, Your

1 Honor, but we also are arguing that we have an
2 overriding interest, that even if there were --

3 QUESTION: By the way, what standard do you
4 think we should apply to this, to this claim?

5 MR. GRAYBILL: Without the, without the
6 showing of substantial infringement, Your Honor, the
7 complaint should be dismissed.

8 QUESTION: Yes, but say there's a substantial
9 infringement. Then what standard do we use in judging
10 its constitutionality?

11 MR. GRAYBILL: The state would be required to
12 show an overriding interest, Your Honor.

13 QUESTION: Overriding?

14 MR. GRAYBILL: That overrides the particular
15 interests, First Amendment interests that are presented
16 by the plaintiffs before the Court.

17 QUESTION: Well, overriding doesn't help a
18 whole lot.

19 Does just any interest -- will just any
20 interest override, or what?

21 MR. GRAYBILL: Well, there -- I think the
22 interests that we have shown that reflect the entire
23 evolution of improving and expanding the democratic
24 opportunities for the citizens in this country and the
25 state, this is consistent with that.

1 QUESTION: Well, is the standard the so-called
2 compelling interest? Is that what the standard we would
3 use here?

4 MR. GRAYBILL: I think these, these values
5 would rise to the level of a compelling interest,
6 Justice White.

7 QUESTION: But is that the standard we use?
8 Do we ask is the -- does the state have a compelling
9 interest to justify these restrictions?

10 MR. GRAYBILL: That is the standard that this
11 Court has typically used in these types of cases.

12 I'd like to reserve --

13 QUESTION: Do you think that's the standard we
14 used in Stoner?

15 MR. GRAYBILL: Stoner, Your Honor?

16 QUESTION: Yes.

17 MR. GRAYBILL: I'm sorry, I'm not familiar
18 with that case. Perhaps I should be.

19 QUESTION: Well, all right, all right.

20 MR. GRAYBILL: I'd like to reserve the rest of
21 my time.

22 QUESTION: We'll hear from you now, Mr.
23 Brosnahan.

24 ORAL ARGUMENT OF JAMES J. BROSNAHAN
25 ON BEHALF OF THE APPELLEES

1 MR. BROSNAHAN: If it please the Court:

2 The State of California, as has been shown in
3 the record before Your Honors, dictates what political
4 parties can say, and indeed, who it is, at least by
5 office, that will say it. And in doing such, the state
6 aggrieves the First Amendment in some very serious
7 respects.

8 First of all, this is a prior restraint by the
9 state. Secondly, it goes to the subject matter. It is
10 not content-neutral. It bans all political endorsements
11 by all parties. Third, it applies not only to mature
12 parties such as the Democratic Party or the Republican
13 Party, but also one of my clients here, the State
14 Libertarian Party, who is forbidden from endorsing
15 candidates by one of the sections which is before Your
16 Honors.

17 Only California and New Jersey have such a
18 provision. The other 48 states do not have the
19 difficulties such that the state counsel was seeking to
20 elucidate here a moment ago.

21 QUESTION: I'm sorry, Mr. Brosnahan. Did you
22 say New Jersey has the same thing?

23 MR. BROSNAHAN: Yes, Your Honor. I'm sorry to
24 bring that news.

25 (Laughter.)

1 MR. BROSNAHAN: Also, it is striking that the
2 prohibition in the State of California is a flat
3 prohibition. It does not present the kind of problem as
4 in Buckley v. Valeo, where you could say, well, it's a
5 limitation on a certain amount of money and the rest can
6 at least be used for expression. No. It is a crime in
7 California, has been a crime since 1963, for a political
8 party to state its endorsement as to a particular
9 candidate.

10 QUESTION: What do you have to do to get out
11 of it, Mr. Brosnahan? Is there no way of getting out of
12 it once you're, once you're on the ballot, once you're a
13 ballot-qualified party?

14 MR. BROSNAHAN: That's right, Your Honor,
15 unless you go to the legislature and try to get that
16 changed up there.

17 QUESTION: Okay. So it's not a matter of
18 saying, well, I just won't, I just won't have a primary
19 then. You have to have a primary. You have no choice
20 about being in the primary as a party, right?

21 MR. BROSNAHAN: You have to have a -- there
22 really is no choice. You have to have a primary. The
23 Democratic Party and the Republican Party, indeed, any
24 party would have to bring their membership down below 1
25 percent in California to get off the ballot, if they

1 chose that way to do it. We submit no party is going to
2 do that. So really, there's no choice.

3 QUESTION: This law doesn't prevent individual
4 members of the central committee from going around
5 campaigning for certain people?

6 MR. BROSNAN: That's true, Justice White, as
7 individuals, but not -- they cannot --

8 QUESTION: Or even -- can they organize within
9 the committee, like Committee for John Jones, made up of
10 just members of the central committee?

11 MR. BROSNAN: No, I don't think they could
12 do that, Justice White, because they could not represent
13 in any way directly --

14 QUESTION: No, no, no, they don't represent
15 anything. They just -- except that everybody knows
16 they're members of the central committee.

17 MR. BROSNAN: If they, if they are doing
18 something that purports to be an endorsement by the
19 committee, and there would have to be lines drawn, then
20 it would be criminal, and --

21 QUESTION: I don't suppose anybody's been put
22 in jail under this.

23 MR. BROSNAN: Not yet, but there is one
24 California case that does refer to it as criminal, and
25 indeed, when counsel for the state says that they are

1 attempting to avoid confusion, in fact, in the State of
2 California there are slate mailers -- and these are in
3 the record described, that come and they use the word
4 "Democratic," they use the word "Republican," and they
5 list who should be there.

6 There's tremendous confusion, tremendous
7 animosity and difficulties, and as a matter of fact, not
8 only is the party, say, the Republican Party, not free
9 to endorse a candidate, but as happened to the
10 Democratic Party, a member, a Grand Dragon of the Ku
11 Klux Klan was nominated in San Diego to be the
12 Democratic candidate for Congress, as the record shows,
13 and the Democratic Party was not only forced by the law
14 of California to be silent, it could say nothing, but he
15 automatically qualified to become a member of the State
16 Committee.

17 Now, they did in that case, they just refused
18 to seat him, they just wouldn't seat him, but the law
19 was that he became a member of the Democratic Party, and
20 there wasn't anything that could be done about it.

21 The history of these provisions, I'd like to
22 say a word about it because this is not 70 years of
23 tradition. As with regard to the endorsement, as I
24 said, that's 1963, so that's a relatively new
25 provision. As to the provisions with regard to the

1 state telling the parties who will be their leaders,
2 that does go back further, but the most detailed
3 articulation was 1977, but you can trace it all the way
4 back in some form or another to 1929.

5 So it has been a gradual accretion of power by
6 the legislature in California, and I submit that the
7 Court is not looking at the ghost of Hiram Johnson today
8 in these specific provisions, nor is the basic --

9 QUESTION: Was there, was there a challenge to
10 the selection of the county central committees?

11 MR. BROSNAHAN: In this case?

12 QUESTION: In this lawsuit?

13 MR. BROSNAHAN: No, no, Your Honor. Those are
14 elected, I would say, democratically.

15 QUESTION: Well, there are other California
16 regulations and requirements at issue here in addition
17 to the pre-primary endorsement issue.

18 MR. BROSNAHAN: That's true, Justice O'Connor,
19 and the main ones are, specifically, the state dictates
20 who will be on the State Central Committees.

21 QUESTION: Isn't that a fairly common sort of
22 statute in the states around the country?

23 MR. BROSNAHAN: It is not, Justice O'Connor.
24 That's only -- we have found only one state where it is
25 like California. That's Kansas. There are then nine

1 states, and Arizona is one of them, and Michigan is one
2 of them -- the rest are mostly western states -- that
3 have what I would call fairly described to you as a mix,
4 that is to say, people can be elected but also certain
5 officers are dictated by the state as being on the
6 committee.

7 QUESTION: Right.

8 MR. BROSNAHAN: The rest of the states, that
9 is to say, approximately 40 states, do not purport to
10 tell political parties who will be their leadership.

11 QUESTION: Well, now, didn't this Court's
12 decision in Chaney uphold some sort of state regulation
13 of who serves on the state committee?

14 MR. BROSNAHAN: I don't think so, if the Court
15 pleases. I read that decision. And reading it and
16 writing it are two different things, but as I read it,
17 in the State of Washington there was a general
18 provision, very general, very broad, about political
19 parties, and the only dictation was there should be a
20 balance between men and women. The rest of the rights
21 that were involved in that case -- and this was the
22 reason for its reversal - was that all of the other
23 provisions came from the Democratic Party, I think it
24 was the Democratic Party itself.

25 QUESTION: Well, I thought it was a statute

1 requiring each major party to have a state committee
2 consisting of two people from each county.

3 MR. BROSNAN: That is, that is correct, and
4 also, I believe --

5 QUESTION: And the Court said that the state's
6 interest was unquestionably legitimate.

7 MR. BROSNAN: Up to that point.

8 QUESTION: And that a substantial regulation
9 of elections is to be expected and upheld.

10 MR. BROSNAN: There is that language in the
11 case, but the holding, and the reason I think it was
12 sent back, and the reason I think it commended itself to
13 so many of the justices here, just from reading it was
14 that all of the internal workings which were being
15 challenged in fact came from the party itself, which is
16 at the heart of the right of association.

17 If I may say so, the burden on a party is
18 evident, and I wish to stress it. When the state
19 dictates to a political party who their leaders shall be
20 really challenges the very essence of an association.
21 And we know from common understanding, just watching the
22 interest people have in who the leaders will be of a
23 political party, whether it be in the --

24 QUESTION: Well, the California statute
25 requires alternating every two years --

1 MR. BROSNAN: It does.

2 QUESTION: -- between northern and southern
3 California. Of course, there's kind of unstated warfare
4 in that state between the north and the south. Do you
5 think the state --

6 MR. BROSNAN: Not completely resolved by
7 that provision because if I'm right, and I think I am,
8 the south gets to be the chair during all the
9 presidential elections. But a minor point, given the
10 weighty things here.

11 But there's no other state, there is no other
12 state that we can find that has any such limitation, and
13 if -- say the Libertarian Party, for example, comes up,
14 as indeed they may, with a vigorous, vigorous, vibrant
15 leader who is able to increase their votes from 2
16 percent to 4 percent to 6 percent. The State of
17 California, the legislature dictates to them that that
18 person must be removed, and the legislature has not a
19 single member of the Libertarian Party there to even
20 entertain a bill, much less to muster it.

21 QUESTION: Do you recall what the, what the
22 consequence was in Chaney?

23 Could you get off the ballot? Was the
24 consequence if you didn't comply with this, with this
25 manner of forming your party that you simply couldn't,

1 couldn't have the state fund a primary for you? Or did
2 you have to be in the primary?

3 You see, that makes some difference to me. It
4 seems to me the state can attach some, some conditions,
5 perhaps, to paying for your primary. But you're
6 talking --

7 MR. BROSNAN: May I address that --

8 QUESTION: Yes.

9 MR. BROSNAN: -- not so much in Chaney,
10 because at that level of detail in Chaney, I'm not sure
11 that I would be accurate, but on the level of what is
12 appropriate, the state does finance, in 49 states the
13 state does finance. In South Carolina they do not.

14 But they certainly have, and this Court has
15 held, certain rights with regard to elections,
16 particularly the general election in the fall. That has
17 to do with external workings. They have a right, as has
18 been said in this case, to orderly elections and to
19 statutes reasonable on their face that require orderly
20 elections.

21 They do not have a right, and this is the
22 profound essence of this case as far as at least my
23 clients see it, they do not have a right to orderly
24 parties. That is a completely different thing. And the
25 spectrum along which we move with this case is far

1 removed from the essence of a state saying, for example,
2 well, you must be in a party a certain period of time
3 before you run for election, as has been brought up
4 several times in Anderson and other cases.

5 This case is more like Wigoda v. Cousins and
6 the cases where this Court held that the state may not
7 say who will be a delegate. The state should not say
8 who should lead parties, and I am prepared at least to
9 suggest to the Court that this is a very dangerous
10 idea. It is an extremely dangerous idea, and one that
11 does not commend itself, no matter what one's party, to
12 a comfortable feeling about how democracy would work
13 where legislatures would dictate who would lead
14 particular parties.

15 Justice Harlan said in NAACP v. Alabama, he
16 observed a nexus, a close nexus between the right of
17 association and the right of speech, and we argue that
18 today. We say that speech is affected by who is the
19 speaker; who it is that will lead the party is affected.

20 For example, the irony is, going back to the
21 days of populism in California where the legislature, as
22 has been historically written about, was in some ways
23 corrupt, which party would attack that problem were they
24 to be dictated to by the legislature itself?

25 We are not confronted today as far as argument

1 is concerned, and I don't think this Court is confronted
2 with an abstract question about whether it would be all
3 right to allow a legislature to decide something, and
4 that is because each legislator would have interparty
5 and intraparty conflicts, conflicts as to whether they
6 will be running the party versus someone else, and
7 conflicts as to whether the Libertarian Party, of which
8 they will not be a member, by the majority in the
9 California legislature at least, will be a strong,
10 vibrant party.

11 The Libertarian Party in this case was
12 required to adopt the rules of the Peace and Freedom
13 Party. They had to take those rules. That's all that,
14 that's all that they could get up to this point.

15 QUESTION: Mr. Brosnahan, haven't we crossed
16 the bridge, though, when we've permitted the states to
17 require parties to select their leaders by primary?

18 I mean, suppose the Libertarian Party says we
19 like the smoke-filled room. We really don't think the
20 way -- and they take a vote democratically, and 99
21 percent of all of their members would rather not have a
22 primary; they would rather have the party leaders meet
23 in a smoke-filled room; they know more about it, I don't
24 trust my judgment as much as I do theirs. And yet,
25 we've said, we've said the states can say to a party,

1 you cannot pick your leaders that way; we'll tell you
2 how to pick your leaders, your candidates. You pick
3 them through a primary.

4 MR. BROSNAHAN: Nothing Justice Scalia, in
5 this case, as we argue to Your Honor, nothing in this
6 case implicates or attacks the primary system.

7 QUESTION: Well, I know that. But you tell me
8 where's the line. Why can a state say that and yet not
9 say what it said here, that you have to have some --

10 MR. BROSNAHAN: I think the state --

11 QUESTION: -- how your delegates are going to
12 be distributed geographically and all sorts of other
13 things.

14 Where's the line?

15 MR. BROSNAHAN: I think the line is right
16 around the poll which has to do with the state's right
17 to see that in an earlier election party disputes are
18 resolved. And this Court had spoken to that issue.
19 There is, there is a right that the State has to see to
20 it that in the general election, party disputes will
21 have been resolved. We don't quarrel with that because
22 it doesn't relate to the two major clusters of issues,
23 endorsement and leadership in the party. It doesn't
24 relate to that at all.

25 And so we do not question the right of the

1 state to say if you are a Republican, for example, and
2 you have a party dispute, you should run in the primary
3 election, and it will all be resolved, or some states
4 have variations with conventions and alternatives and
5 things like that.

6 QUESTION: Well, anyway, I gather Wigoda said
7 that a state could not tell a national party who was to
8 be seated for the state --

9 MR. BROSNAHAN: That's correct.

10 QUESTION: -- at its national convention.

11 MR. BROSNAHAN: That's correct.

12 QUESTION: That goes rather far, doesn't it?

13 MR. BROSNAHAN: And also Wisconsin v.
14 LaFollette, and the times have really changed in terms
15 of the old Populist notions which, as I say, are not
16 implicated by these specific statutes. Nowhere today
17 does one see the kinds of bosses that were here 60, 70
18 years ago. James Michael Curley, Mayor Haig, Boss
19 Tweed, these people are gone.

20 There are, there are powerful legislators, and
21 that is, that is at least a footnote to this story in
22 the sense that we believe this case presents this Court
23 with an opportunity to write an opinion which will allow
24 political parties in this country of whatever name, if
25 they choose -- and that's a major point that's been made

1 -- If they choose, to be open and to bring in in the
2 neighborhoods of this country people to participate in
3 parties.

4 All of my clients, and there are many -- I
5 represent on the Democratic side the county committees
6 -- Justice White asked about this -- the county
7 committees that represent, in registered voters, over
8 half of the registered Democrats in the State of
9 California -- to open up this process, as it is true in
10 other states, so that citizens without a lot of power
11 can be part of this process.

12 The people in California, I think, fairly
13 stated, would enjoy as any citizen would enjoy what is
14 done in other states. I think of Minnesota, it's in the
15 record, I think of Massachusetts. There are
16 declarations by James McGregor Burns and by the mayor of
17 Minneapolis, and they give figures to this Court as to
18 what happens when parties are free to structure
19 themselves the way they want. The State of
20 Massachusetts, sometimes, there are over hundreds of
21 thousands of citizens who participate in the party. It
22 is not dictated from a capital. It is not, it is not
23 the question of dominance.

24 The standard is compelling interest. The
25 state has great trouble in articulating that, that

1 standard, or to give this Court a basis on which to
2 treat, as you are required to do in many other cases,
3 the serious concerns articulated, and there's been five
4 years of litigation.

5 QUESTION: Is it your view that any limit on
6 the term of the party chairman is unconstitutional, or I
7 take it the compelling interest standard applies and we,
8 we -- could the state limit the term to, say, ten years?

9 MR. BROSNAHAN: I think it is probably
10 unconstitutional. Two years certainly is very short and
11 cuts right into the accumulated experience and
12 leadership qualities that one might possess.

13 In fact, one of these parties changed its
14 term, and I don't know about ten years. You could come
15 to a point, I suppose, where the state would make a
16 greater interest. But I have not, I have not heard, nor
17 have I read a strong compelling interest based on
18 general elections, based on that justification, for the
19 limitation of the term.

20 Why does the state need to tell the
21 Libertarian Party you will have a leader for two years,
22 and at the end of that two years, no matter what you
23 have accomplished, no matter what you have done, you
24 will be out.

25 Surely I think I sense that we are at the very

1 heart of the First Amendment. One reads in the
2 decisions of this Court the scholarly musings of
3 Professor Emerson or Meiklejohn or any of these great
4 scholars about what's involved. This is not a gas
5 company in San Diego when I speak of political parties.
6 Nor is it the First National Bank of Boston in the
7 Bellotti case. This is a political party in a free
8 state in a free country, and the government says to it,
9 here, these are your leaders.

10 That is the kind of thing that we have brought
11 to Your Honors and that we seek to have reversed.

12 QUESTION: Suppose the state --

13 MR. BROSNAHAN: Or affirmed, rather,
14 affirmed. Affirmed.

15 (Laughter.)

16 MR. BROSNAHAN: Thank you.

17 Let me make a note of that.

18 QUESTION: Do you think the state could just
19 prevent access to the ballot by a party and just say
20 candidates and wouldn't say they are Democratic or
21 Democrats or Republicans or anything like that?

22 MR. BROSNAHAN: In the nonpartisan elections
23 that is done.

24 QUESTION: Well, I know it's done. How about
25 in so-called partisan elections?

1 I don't suppose the parties can force their
2 way onto a state run election ballot, can they?

3 MR. BROSNANAN: If they qualify, I suppose.
4 The state has qualifications --

5 QUESTION: Well, the state doesn't, doesn't
6 provide for qualifying. They just say you can have --
7 political parties are legal, but they don't go on the
8 ballot as -- their candidates don't go on the ballot as
9 party candidates.

10 MR. BROSNANAN: I'm not sure about that,
11 Justice White. I think this Court would, if it came
12 here, I think it would have to look, look at that in
13 terms of expression, but it might be that the ballot
14 presents a basis for control.

15 Thank you.

16 QUESTION: Thank you, Mr. Brosnahan.

17 You have two minutes, Mr. Graybill.

18 REBUTTAL ARGUMENT OF GEOFFREY LLOYD GRAYBILL
19 ON BEHALF OF APPELLANTS

20 MR. GRAYBILL: Thank you.

21 I'd like to point out for the Court what the
22 criminal provisions involved in this case do and do not
23 do. It is not a crime for a party central committee to
24 make an endorsement. It is a crime for somebody to
25 claim that a candidate for the party's nomination in a

1 primary election is endorsed by the party, and so it
2 doesn't follow -- and not even the plaintiffs contend
3 that Section 29102 is applicable to the endorsement
4 statute for the reasons stated in our brief. It is not,
5 or to any of the other statutes. Those apply to
6 election officials only. That is referred to in People
7 v. Crutcher, and it is also reflected in Section 15 of
8 the Elections Code which tracks the language in 29102.

9 QUESTION: What is the sanction, then,
10 against, against the county committees violating the
11 prohibition of endorsement?

12 MR. GRAYBILL: Being hit with a, a petition
13 for an injunction in state court, Justice Scalia. This
14 -- these statutes are designed to protect the First
15 Amendment rights of the members of the political parties.

16 QUESTION: So the only thing that could happen
17 to you if you violate it is you get an injunction.

18 MR. GRAYBILL: That's correct.

19 The -- another point that we'd like to make is
20 that although the provision for the ban on endorsements
21 did not show up in statute until 1963, it is well
22 documented and undisputed that this has been the
23 longstanding policy of the major parties in California
24 all the way through to the present time, and there is
25 really nothing substantial in the record to indicate

1 that that is not the case to this day.

2 The state does have an overriding compelling
3 interest, I believe, if Justice White was referring to
4 the Storer case.

5 QUESTION: Yes. I have made the same mistake
6 before, so don't worry.

7 MR. GRAYBILL: It was a compelling interest
8 standard, and California was found to have met that
9 standard in Storer, to protect the integrity of the
10 parties in the primary system and in the general
11 election system.

12 QUESTION: Your time has expired.

13 MR. GRAYBILL: Thank you, Justice Brennan.

14 JUSTICE BRENNAN: The case is submitted.

15 (Whereupon, at 2:39 o'clock p.m., the case in
16 the above-entitled matter was submitted.)
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CERTIFICATION

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NO. 87-1269 - MARCH FONG EU, SECRETARY OF STATE OF CALIFORNIA, ET AL.,

Appellants, V. SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman
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