

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: LOUISE RENNE, SAN FRANCISCO CITY  
ATTORNEY, ET AL., Petitioners v.  
BOB GEARY, ET AL.

CASE NO: 90-769

PLACE: Washington, D.C.

DATE: April 23, 1991

PAGES: 1 - 50

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IN THE SUPREME COURT OF THE UNITED STATES

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LOUISE RENNE, SAN FRANCISCO CITY :  
ATTORNEY, ET AL., :  
Petitioners :  
v. : No. 90-769  
BOB GEARY, ET AL. :  
----- X

Washington, D.C.  
Tuesday, April 23, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:58 p.m.

APPEARANCES:

DENNIS AFTERGUT, ESQ., Deputy City Attorney of San Francisco, San Francisco, California; on behalf of the Petitioners.  
ARLO HALE SMITH, ESQ., San Francisco, California; on behalf of the Respondents.  
CEDRIC C. CHAO, ESQ., San Francisco, California; on behalf of California Democratic Party, et al., as amici curiae, supporting the Respondents.

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

2 (12:58 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 90-769, Renne v. Geary. Is that the way your  
5 client's name is pronounced? Wren or Rene, is it?

6 MR. AFTERGUT: Rennie, Mr. Chief Justice.

7 QUESTION: Rennie?

8 MR. AFTERGUT: Rennie.

9 QUESTION: Very well.

10 ORAL ARGUMENT OF DENNIS AFTERGUT

11 ON BEHALF OF THE PETITIONERS

12 MR. AFTERGUT: Mr. Chief Justice, and may it  
13 please the Court:

14 Article II, section 6(b) of the California  
15 Constitution provides that no political party or central  
16 committee shall endorse, support, or oppose candidates in  
17 nonpartisan elections -- that is, elections for judicial,  
18 school, county, or city office. At issue in this case is  
19 whether the people of California may in the nonpartisan  
20 arena restrict the speech of those parties that have  
21 chosen to accept the benefits that the State confers upon  
22 its official parties in the partisan arena.

23 And because our argument so involves these  
24 special advantages, I begin by describing them for the  
25 Court, how parties get those advantages, and then I

1 proceed to discuss how they justify the balance that the  
2 people of California have sought to strike between their  
3 two systems, their partisan system and their nonpartisan  
4 system.

5 QUESTION: Would you mind inserting another  
6 little item, which is to tell us how this case arises?  
7 Now, the respondents are not political parties in the  
8 State of California, are they? They're voters?

9 MR. AFTERGUT: The respondents include some  
10 voters, Your Honor, and they include some individual  
11 members of local central committees -- that is the local  
12 organ in California of the State party. But you are  
13 correct, Your Honor, the respondents are not parties  
14 themselves.

15 QUESTION: And so how do we address the question  
16 in that light? Is it an overbreadth argument of some  
17 kind? I mean, 6(b) is addressed to political parties, I  
18 thought. Isn't that right?

19 MR. AFTERGUT: That's correct, Your Honor.

20 QUESTION: And we don't have a political party  
21 here.

22 MR. AFTERGUT: Only as amici, Your Honor.

23 QUESTION: Yes. And so how is it that we even  
24 get to the question?

25 MR. AFTERGUT: Well, these respondents, Your

1 Honor, seek -- the way the case arises is they had -- they  
2 sought to place in the San Francisco voter pamphlet  
3 endorsements either of them or endorsements by the  
4 committees of which they were a member. And they sought  
5 to have that endorsement circulated through the  
6 government's publication, the ballot pamphlet to all  
7 voters. That's how the case arises.

8 QUESTION: Some of them were candidates who were  
9 being endorsed?

10 MR. AFTERGUT: I don't believe that's correct,  
11 Your Honor, although I can't answer that question for  
12 sure.

13 QUESTION: Well, perhaps we should address some  
14 of these questions to your opponent as to the standing of  
15 respondents.

16 MR. AFTERGUT: The way that the official parties  
17 in California become official parties is by choice. That  
18 is California Election Code section 9951 provides the  
19 mechanism by which a group seeks to become an official  
20 party. And I should also say that section 35 of the  
21 California Election Code defines parties as ballot-  
22 qualified parties, so that when article II, section 6(b)  
23 refers to parties, it is referring to ballot-qualified  
24 parties, that is those who have chosen to take advantage  
25 of the statutory benefits.

1 QUESTION: But what kind of -- how did this case  
2 get started? These -- you say these respondents wanted to  
3 put their -- wanted to recite in these pamphlets that  
4 there had been endorsements?

5 MR. AFTERGUT: That's correct, Your Honor.

6 QUESTION: And who -- and then somebody refused?

7 MR. AFTERGUT: Yes. The --

8 QUESTION: Who refused?

9 MR. AFTERGUT: The San Francisco Registrar of  
10 Voters.

11 QUESTION: Refused --

12 MR. AFTERGUT: Yes.

13 QUESTION: -- to put them in. And then the --  
14 and then they sued, the other people sued? Is that it?

15 MR. AFTERGUT: That's correct, Your Honor.

16 QUESTION: Because they wanted to get these  
17 endorsements in the pamphlets.

18 MR. AFTERGUT: In a pamphlet that is sent to all  
19 voters in the city, and which we contend would make a  
20 nonpartisan election partisan because these endorsements  
21 would go to every voter in the City and County of San  
22 Francisco.

23 QUESTION: And the grounds for refusing by the  
24 official was that the State law forbade endorsements?

25 MR. AFTERGUT: That the State law forbade

1       endorsements in nonpartisan elections.

2               QUESTION: Exactly.

3               MR. AFTERGUT: Yes.

4               QUESTION: Mr. Aftergut, could you tell me, this  
5       constitutional provision which says that no political  
6       party may endorse, support, or oppose a candidate for  
7       nonpartisan office, does -- would that prevent a political  
8       party from contributing money for the candidate to promote  
9       himself? In other words, is it only addressed to an  
10      endorsement? Could the Republican Party support the  
11      candidate so long as it did not say that he is the  
12      Republican-endorsed candidate?

13              MR. AFTERGUT: No, Your Honor.

14              QUESTION: It could not? It cannot contribute  
15      money or do anything else to assist his campaign?

16              MR. AFTERGUT: That's correct. Support would  
17      include that.

18              The advantages that political parties, official  
19      political parties, ballot-qualified political parties get,  
20      parties that have chosen to become official parties, are a  
21      vast array of benefits. I want to go through them quickly  
22      for the Court so the Court understands.

23              First, a ballot-qualified party is a party that  
24      has guaranteed access to the partisan ballot, to the  
25      Statewide ballot. Second, the State operates the



1 primaries for those ballot-qualified parties.

2 Third, the State assists those parties in  
3 expanding their affiliation in a very special way. The  
4 voter registration card includes a list of the ballot-  
5 qualified parties and only the ballot-qualified parties,  
6 so that a voter registering marks which party he or she  
7 wishes to affiliate with.

8 Fourth, the parties are entitled to receive free  
9 of charge from the State a copy of the list of voter  
10 affiliation -- of the registered voters and their  
11 affiliation.

12 Fifth, the official parties may send to this, to  
13 the individuals on this list, those people that the State  
14 has helped the parties affiliate with, may send them free  
15 of charge a solicitation letter allowing the parties to  
16 collect funds from these individuals.

17 QUESTION: What do you mean send it free of  
18 charge?

19 MR. AFTERGUT: It is sent without expense to the  
20 party with the sample ballot and the voter pamphlet that  
21 go out.

22 QUESTION: Oh, I see.

23 MR. AFTERGUT: State law provides for that.

24 QUESTION: The State pays the postage.

25 MR. AFTERGUT: The State pays the postage. It

1 can go out -- the letter and the solicitation envelope  
2 goes out.

3 Sixth, the State allows parties to receive a \$25  
4 tax contribution on the income tax form dedicated to that  
5 party.

6 Seventh, the party meetings, the central  
7 committee meetings, occur in the seat of government, in  
8 the city hall, called by the clerk. This is an array of  
9 advantages that is unique in its scope.

10 And why has California chosen to give its  
11 official parties, those that have chosen to become  
12 parties, why has California chosen to give them more  
13 advantages than any other State? The reason has to do  
14 with the nature of California itself, and has to do with  
15 the decisions of this Court in the ballot access area.

16 California, being the largest of our States and  
17 being a State of tremendous diversity, finds a need to  
18 promote parties in order to promote stability in such a  
19 large and diverse State, in order to -- parties help forge  
20 consensus among diverse groups, as this Court has  
21 recognized in the Storer case, in the Jenness case, in the  
22 American Party v. White case. And parties help prevent a  
23 balkanization of the political process so that government  
24 can operate.

25 So California has chosen to structure its

1 government, the people of California have chosen to  
2 structure their government in this way, strengthening the  
3 parties.

4 But there is a danger. The danger is that  
5 California at the same time has coexisting a nonpartisan  
6 system, a strong nonpartisan system, a long tradition of  
7 nonpartisanship that goes back to the progressive era in  
8 Hiram Johnson. And that commitment to nonpartisanship in  
9 fact is stronger than any other State because California  
10 is the only State in the country which absolutely  
11 prohibits nonpartisan nomination in all local and all  
12 school --

13 QUESTION: Prohibits partisan nomination.

14 MR. AFTERGUT: Excuse me, prohibits partisan  
15 nominations in all local, all city, all county, all  
16 school, all judicial elections.

17 QUESTION: Well, how does 6(b) operate? Now,  
18 for example if there were a general election coming up and  
19 there were some judicial candidates on the ballot, listed  
20 on the ballot as nonpartisan, I take it that this  
21 provision 6(b) might be said to prohibit, let's say, the  
22 Democratic Party from preparing a little card to give to  
23 registered Democrats by the precinct committeeman saying  
24 these judicial candidates are candidates that we think  
25 merit your support. Take this with you to the ballot on

1 election day.

2 MR. AFTERGUT: That's correct.

3 QUESTION: You could enjoin the distribution of  
4 a communication?

5 MR. AFTERGUT: That's correct. That is the --  
6 an injunction --

7 QUESTION: That's the position you take?

8 MR. AFTERGUT: Yes. And that is the only  
9 sanction that exists in the State of California. In other  
10 words, there's no criminal penalty for an official party's  
11 endorsing. It's simply that some --

12 QUESTION: But you can suppress the speech?

13 MR. AFTERGUT: Well, the --

14 QUESTION: The political speech.

15 MR. AFTERGUT: The government could bring an  
16 action to enjoin that, or an individual could bring an  
17 action to enjoin that, as happened in the Unger case.

18 QUESTION: And how is it you think the First  
19 Amendment would allow that?

20 MR. AFTERGUT: For the reasons that I am saying,  
21 Your Honor, that this is an essential part of the  
22 structure of government that California has chosen. That  
23 is to say at the same --

24 QUESTION: There are other States that have  
25 nonpartisan judicial elections, and they don't purport to

1 prevent speech by political parties.

2 MR. AFTERGUT: That's correct, Your Honor, and  
3 that was the point I was trying to develop in terms of a  
4 difference that exists in California. And that is to say  
5 California gives to those parties that have chosen to  
6 become official parties this vast array of benefits. And  
7 then secondly, California has this uniquely strong  
8 comprehensive commitment to nonpartisanship.

9 And so what California is saying when it speaks  
10 to its official parties, those that have made the choice  
11 of becoming official parties, it has given to them a  
12 choice. And it has said you may have this vast array of  
13 advantages in order to assist in organizing our political  
14 system across the State. But with that vast array of  
15 benefits there is a danger. And the danger is that the  
16 State -- the State by giving to parties that have chosen  
17 to take advantage of these benefits -- the State itself  
18 will be weighing into the nonpartisan arena.

19 QUESTION: Well, do you think that the State in  
20 First Amendment analysis can just offer additional  
21 benefits as a sort of quid pro quo for giving up First  
22 Amendment rights?

23 MR. AFTERGUT: Where the State has a  
24 sufficiently compelling interest and where the people of  
25 California have said this is how we wish to structure our

1 government. We structure our government by having a  
2 strong partisan, strong party role at the State level. We  
3 need it in our State. But at the same time we have a  
4 strong nonpartisan system. And the danger is that the  
5 State has -- that these benefits that the parties have  
6 chosen to take, these benefits enhance the voice, amplify  
7 the voice of parties in a way that will put them, if they  
8 may endorse, back at the center of the nonpartisan arena  
9 where nonpartisanship envisions they do not play the  
10 central part.

11 QUESTION: You describe all of the initial  
12 regulations that you'd recited as benefits. I take it  
13 parties are required by law to have the meetings that you  
14 have described; are they not?

15 MR. AFTERGUT: Official -- the answer is I  
16 believe you're correct that official parties are required,  
17 although I am not, I must say I am not certain. But the  
18 point is --

19 QUESTION: Of course it's required by law that  
20 they meet at a particular time and place as designated.  
21 So these aren't just benefits, they're regulations.

22 MR. AFTERGUT: But the point is that the -- that  
23 may be so with respect to that particular regulation, Your  
24 Honor. But the point is that the party has the choice.  
25 The party has the choice of not accepting those benefits

1 and of being like anybody else in the nonpartisan arena.  
2 They can speak however loudly they want in the nonpartisan  
3 arena.

4 QUESTION: They just can't have a candidate in  
5 the primary. You can't have a candidate in the primary  
6 unless you're an official political party.

7 MR. AFTERGUT: I'm not sure I understand Your  
8 Honor's question.

9 QUESTION: Well, you're telling us that the  
10 parties voluntarily accept all of these emoluments and  
11 benefits that you have described. And I am suggesting to  
12 you that an official party must comport with this  
13 regulatory scheme or it cannot enter a primary and it  
14 cannot support a candidate in any primary. That's the  
15 definition of a party.

16 MR. AFTERGUT: The party does not need to take  
17 advantage of these benefits, Your Honor, perhaps with the  
18 exception of the regular meetings. But the others are not  
19 regulations. The party does not have to nominate, does  
20 not have to have guaranteed access, it doesn't have to  
21 take advantage of these benefits. It has -- it makes the  
22 choice --

23 QUESTION: Can the Democratic Party have primary  
24 elections and not be an official party with respect to all  
25 of the regulations that you have described?

1 MR. AFTERGUT: The Democratic Party can -- the  
2 Democratic Party can, absolutely, get its candidate on the  
3 ballot for -- I'm not sure about for a primary election,  
4 but it can definitely --

5 QUESTION: Well, that's critical, isn't it?

6 MR. AFTERGUT: It can get its candidate on the  
7 ballot by doing what any other group does, and that is by  
8 gathering the number of signatures that are necessary in  
9 order to get on the ballot. The Democratic Party has  
10 chosen to take advantage of these benefits, and the price  
11 for taking advantage of those benefits that California  
12 exacts in order to protect the nonpartisan structure of  
13 its government from the enhanced voice that these benefits  
14 give to parties is to say we need this restriction in  
15 order to keep parties from occupying the central place in  
16 local government and in judicial government.

17 QUESTION: So you say there is a way for a  
18 political party to get on the ballot without becoming an  
19 official party?

20 MR. AFTERGUT: Absolutely, Your Honor.

21 QUESTION: And that's by getting signatures?

22 MR. AFTERGUT: That's correct, Your Honor. And  
23 I can give the Court the statute. I'm not sure I have it  
24 in mind. It's --

25 QUESTION: But getting it -- they can get their



1 candidate on the ballot, but it won't say that that  
2 candidate is a candidate of that particular party, will  
3 it?

4 MR. AFTERGUT: I'm not sure of the answer to  
5 that, Your Honor. I believe -- I am really not sure of  
6 the answer to that.

7 QUESTION: Well, anybody can get on the party --  
8 get on the ballot without a, if they get the number of  
9 signatures.

10 MR. AFTERGUT: That's correct. And --

11 QUESTION: So a political party doesn't get on  
12 the ballot, somebody they want on the ballot gets on the  
13 ballot. But the name of the party won't be there, will  
14 it?

15 MR. AFTERGUT: I'm not sure of the answer to  
16 that question, Your Honor.

17 QUESTION: You're talking about general  
18 elections, because for a primary you have to be an  
19 official party.

20 MR. AFTERGUT: Um-hum. But the point is that  
21 the party may operate like anybody else if it -- if the  
22 party chooses not to take advantage of these benefits that  
23 the State confers.

24 QUESTION: Well, what if you had a party --  
25 let's say it's the Surfer Party, that was just new in

1 California.

2 MR. AFTERGUT: Right.

3 QUESTION: And it had 100,000 members, and it  
4 wanted to, it did not want to go through the official  
5 party structure. Could it have a primary of its own?  
6 Supposing there were two rivals for the nomination of that  
7 party?

8 MR. AFTERGUT: It -- that party, it could choose  
9 its candidate in any way that it wished. Whether it would  
10 be, I do not believe that -- if it were not an official  
11 party it would not have a State-run primary, but it could  
12 choose its candidate by --

13 QUESTION: It could have a convention?

14 MR. AFTERGUT: It could have a convention.

15 QUESTION: But it couldn't go into the primary  
16 election the same day the official parties did?

17 MR. AFTERGUT: Well, it could choose whatever  
18 day it wished, but it would not be -- that would not be --  
19 -- they would not be a ballot-qualified party for running.  
20 They can choose their candidate however they wish. They  
21 can have a private election. They can have a --

22 QUESTION: But the State runs and pays for the  
23 primaries of the validated parties?

24 MR. AFTERGUT: That's correct.

25 QUESTION: Correct? And it mails out

1 information to all the voters about those parties.

2 MR. AFTERGUT: That's correct.

3 QUESTION: And it lists those names on the  
4 ballot.

5 MR. AFTERGUT: That's correct.

6 QUESTION: So that in a sense those parties  
7 become part of the governmental process of election.

8 MR. AFTERGUT: That is correct, Your Honor.

9 QUESTION: It's part of the formal election  
10 system of California, that parties -- part of the election  
11 is you have a party primary and then the formal election  
12 with the party names on it.

13 MR. AFTERGUT: And that is the point. The point  
14 is that because, by becoming part of the State structure  
15 --

16 QUESTION: So it's accepting the benefits. It's  
17 becoming part of the State electoral structure.

18 MR. AFTERGUT: By becoming part of the State  
19 structure in the Statewide context, there is the danger of  
20 -- the State has an enhanced power to regulate and to  
21 protect its other structure, that is its nonpartisan  
22 structure, from parties playing the role that they were  
23 designed not to play. And that's particularly important,  
24 Your Honor, because in local elections, for example, the  
25 danger of party domination is a danger that was part of

1 the experience of California that led to this -- led to  
2 this regulation, to the whole tradition of  
3 nonpartisanship.

4 And it exists for the reasons that Madison  
5 acknowledged, and that is that in smaller localities  
6 single parties do tend to dominate, and there is a danger  
7 from that that does not exist across broader geographic  
8 lines where there is a greater balance.

9 And so what you have in cities like our city,  
10 San Francisco, you have a one-party majority. And you  
11 have, or you may have the reverse in Orange County. And  
12 what happens is that if the State has enhanced the voice  
13 of these particular entities, you have exactly the same  
14 problem that the people wanted to avoid when they enacted  
15 the whole tradition of nonpartisanship. And, frankly,  
16 that is what distinguishes this case, the structure -- the  
17 State's structural interest.

18 That is what distinguishes this case from the Eu  
19 case, because in the Eu case the structure of government  
20 was not involved. In fact when the government in the Eu  
21 case offered as an interest, as a compelling interest,  
22 political stability from the Storer case, the Court's  
23 response was that the State's interest in political  
24 stability does not embrace an interest in party stability,  
25 in preserving party unity.

1                   We're not trying to protect party unity. We're  
2 trying to protect our nonpartisan local and judicial  
3 governments. We're trying to protect them from the danger  
4 of the State's playing a role, weighing in on the side of  
5 the very parties that were, that the people decided were  
6 not supposed to be involved in judicial elections, and  
7 were not supposed to be involved in school elections, and  
8 were not supposed to be involved in city and county  
9 elections. That is the justification, the structure of  
10 our government.

11                   QUESTION: Is the State Attorney General  
12 involved in this case at all?

13                   MR. AFTERGUT: No, he is not, Your Honor. He  
14 was not sued in this case, and he has not been involved.

15                   QUESTION: But this is a provision of the  
16 California Constitution?

17                   MR. AFTERGUT: That is correct, Your Honor.

18                   QUESTION: And he doesn't have any right or duty  
19 to be informed about when some constitutional provision is  
20 at issue?

21                   MR. AFTERGUT: Your Honor, he does have a duty  
22 under the law to be informed, and we fulfilled that duty  
23 by notifying the Attorney General and --

24                   QUESTION: But he never took any position in the  
25 case?

1 question, MR. AFTERGUT: Whatever his reasons for not  
2 taking a position, whether they related to the fact that  
3 he is a partisan officer or was running for governor of a  
4 party, I simply cannot say. I do not know what his  
5 reasons for being here or not being here were.

6 QUESTION: Thank you.

7 QUESTION: Mr. Aftergut, are you going to turn  
8 from the question of the State's interest to the problem  
9 of inclusiveness before you are done?

10 MR. AFTERGUT: Certainly.

11 QUESTION: Okay.

12 MR. AFTERGUT: The principle basically that  
13 we're advocating here, Justice Souter, is really quite a  
14 limited one. That is we do not seek to prevent  
15 endorsement support or opposition by any group other than  
16 those that have chosen to take advantage of the benefits  
17 that I have described.

18 QUESTION: There's no limitation on PAC's and so  
19 on, for example, from coming out and endorsing and working  
20 for candidates?

21 MR. AFTERGUT: I am not sure I understand what  
22 the Court means.

23 QUESTION: Can a political action committee do  
24 the things which the party organization itself may not do?

25 MR. AFTERGUT: I think the answer to that

1 question, Your Honor, would depend upon whose political  
2 action committee that it was. If it were the --

3 QUESTION: Well, what's the -- what's the  
4 standard by which you determine that?

5 MR. AFTERGUT: Well, if this is, if what Your  
6 Honor is asking is could the Democratic Party form a PAC  
7 and do the same thing, the answer to that is no because  
8 that --

9 QUESTION: Well, could I form a PAC of  
10 Democratic surfers and support a candidate?

11 MR. AFTERGUT: Absolutely, Your Honor, because  
12 you and your colleagues are not the beneficiaries of the  
13 State-conferred advantages that are given precisely for  
14 the purpose of enhancing your voice.

15 So what we are proposing here is a limited  
16 principle that applies only to these particular groups  
17 that the State has put in this preferred position.

18 QUESTION: So you're just saying that the only  
19 PAC that cannot support is one that would be sort of an  
20 obvious or blatant alter-ego for the party itself?

21 MR. AFTERGUT: I couldn't have said it better  
22 myself, Your Honor.

23 (Laughter.)

24 QUESTION: Okay.

25 MR. AFTERGUT: Since I see my white light and I

1 would like to reserve some time, let me just summarize by  
2 saying that where the State-conferred advantages meet the  
3 single-party domination that exists in so many localities  
4 is where we have the danger of officials being beholden to  
5 parties at the sponsorship of the State. And in their  
6 ordinary experience the people of California understood  
7 that it would be an absolute fiction to think that  
8 official party endorsements would not dismantle their long  
9 heritage, their long tradition of nonpartisanship.

10 Thank you.

11 QUESTION: Thank you, Mr. Aftergut.

12 Mr. Smith.

13 ORAL ARGUMENT OF ARLO HALE SMITH

14 ON BEHALF OF THE RESPONDENTS

15 MR. SMITH: Yes. Thank you, Mr. Chief Justice,  
16 and members of the Court:

17 I think I'd like to start by saying that I think  
18 Mr. Aftergut overstates the amount of quote, choice,  
19 unquote under California law any party has on being on the  
20 ballot.

21 QUESTION: Could you begin by telling us how the  
22 case came up? 10 registered voters --

23 MR. SMITH: Okay.

24 QUESTION: -- wanted to have something in the  
25 ballot. Can you tell us what they wanted in the ballot?



1 MR. SMITH: Here's what happened. Basically  
2 there were 10 registered voters, some of them county  
3 central committee members. The dispute was with the San  
4 Francisco Registrar of Voters, who categorically took the  
5 position that they would not print any statement by any  
6 candidate indicating a party endorsement under any  
7 circumstance.

8 QUESTION: All right. So these were candidate  
9 endorsements that a candidate is permitted by law to  
10 include in the ballot?

11 MR. SMITH: Yes.

12 QUESTION: And the candidate wished to include a  
13 statement to the effect that he or she had been endorsed  
14 by a particular party or central committee?

15 MR. SMITH: Basically, Your Honor, that's,  
16 that's what the dispute was about. However, there was not  
17 an actual statement that had been rejected. The Registrar  
18 had in advance just taken --

19 QUESTION: No candidate had come forward and  
20 said include this endorsement?

21 MR. SMITH: No. But the Registrar had in  
22 advance said --

23 QUESTION: And no political party had come  
24 forward and said include this endorsement? These are  
25 registered voters who went in and said we think you should

1 include them --

2 MR. SMITH: And county committee members.

3 QUESTION: Did they have any right to --

4 MR. SMITH: Yes.

5 QUESTION: -- to demand that certain materials  
6 be included?

7 MR. SMITH: Yes. A number of these were county  
8 central committee members who were -- county central  
9 committee members. And --

10 QUESTION: Can an --

11 QUESTION: How did that give them any right?

12 MR. SMITH: County central committee members  
13 would -- are by this measure prohibited from, as committee  
14 members, voting to have their committee make endorsements  
15 which the candidates could then include.

16 QUESTION: I thought -- so the prohibition  
17 includes county committee political parties as well as --

18 MR. SMITH: Yes.

19 QUESTION: -- State?

20 MR. SMITH: It includes State and county  
21 committees. It says -- what it literally says is no  
22 political party or party central committee may endorse,  
23 support, or oppose a candidate for a nonpartisan office.  
24 And then -- nonpartisan office is defined as local,  
25 school, or judicial office.

1 QUESTION: Was there any finding that there was  
2 an actual candidate that wanted to have this endorsement  
3 in his or her election?

4 MR. SMITH: No.

5 QUESTION: Was there any indication that a party  
6 central committee wished to make an endorsement?

7 MR. SMITH: Yes. Yes, the Republican Committee  
8 of San Francisco said it would intervene if the district  
9 court judge found that necessary to confer standing. And  
10 the --

11 QUESTION: But it was not a party?

12 MR. SMITH: No. The chairman was a party. The  
13 chairman was -- the chairman was party to the action. And  
14 the chairman and some officers of the -- of both county,  
15 both the Democratic and Republican Committees were parties  
16 to this action.

17 QUESTION: I see how that would give them an  
18 interest in whether the law is valid or not, but I don't  
19 see how that gave them an interest in the act that forms  
20 the subject matter of the suit. Does anyone except the  
21 candidate have the right to demand that something be  
22 included --

23 MR. SMITH: Yes.

24 QUESTION: -- in this mailing?

25 MR. SMITH: Yes.

1 QUESTION: Who has the right to include it?

2 MR. SMITH: As long as reference is made to  
3 ballot measures, any registered voter in San Francisco  
4 could, if they pay the price, include something.

5 QUESTION: Well, this isn't a ballot measure.  
6 It's a political candidacy we're talking about.

7 MR. SMITH: That's right.

8 QUESTION: So can any citizen come forward and  
9 demand that things be included in the pamphlet concerning  
10 a candidate? And if so, where in the record do we find  
11 that regulation or provision?

12 MR. SMITH: You find in the San Francisco  
13 Administrative Code -- you find in the San Francisco  
14 Administrative Code, San Francisco Charter of Provisions,  
15 for candidate statements and for ballot arguments. And  
16 this case involved both candidate statements and ballot  
17 arguments. The San Francisco Registrar took the position  
18 that they would never accept any candidate statement,  
19 period, if it had any party endorsement.

20 QUESTION: May I ask you if the California  
21 constitutional provision had been written in a different  
22 way and simply said that the statements sent out by the  
23 candidate shall not include any party endorsements that  
24 might be made, would that be constitutional?

25 MR. SMITH: Are you talking about in official

1 election material, or are you talking about generally?

2 QUESTION: Official election material, which is  
3 what I gather gave rise to this controversy.

4 MR. SMITH: Your Honor, that might be a -- if it  
5 was a forum-specific regulation that might be a different  
6 problem. But this --

7 QUESTION: In other words, what I'm suggesting  
8 is perhaps even though on its face the California  
9 provision may be overly broad and unconstitutional. Maybe  
10 as applied to the specific controversy here it's a  
11 perfectly proper thing.

12 MR. SMITH: Well, I'm not so sure if it is, and  
13 indeed the California court of appeal recently in a case  
14 called Clark v. Burleigh in a matter involving what  
15 judicial candidates could say, actually invalidated an  
16 election code provision that limited what judicial  
17 candidates could say in their candidate statements. But  
18 whether that's --

19 QUESTION: But it didn't invalidate the  
20 provision prohibiting them from announcing a party  
21 endorsement in their candidate statement, did it?

22 MR. SMITH: No.

23 QUESTION: Which is -- well --

24 QUESTION: Mr. Smith, is at least this clear on  
25 the standing point, that the only reason the Registrar

1 gave, even though there may have been -- may have been  
2 other reasons why he might have rejected the submissions  
3 for the --

4 MR. SMITH: The only reason was the State  
5 constitutional provision.

6 QUESTION: That's the only reason he gave?

7 MR. SMITH: That's right. And the respondent --  
8 the petitioner has never argued otherwise any points.

9 QUESTION: And as far as we know there is no  
10 other basis? There may be other bases, but we're not  
11 sure?

12 MR. SMITH: They have never asserted any other  
13 basis. Indeed on this point they, both sides have agreed  
14 the whole time that --

15 QUESTION: Well, what submission are you -- was  
16 there an actual submission made?

17 MR. SMITH: No. Basically the Registrar just,  
18 when asked, said that they would follow article II,  
19 section 6(b), would not allow any candidates to print any  
20 such endorsements. And the parties wanted to make  
21 endorsements and have the candidates go use the  
22 endorsements in their candidate statements.

23 QUESTION: Well, what are the merits, Mr. Smith?

24 MR. SMITH: Your Honor, on the merits, I think  
25 it's hard to envision a more flagrant violation of the

1 First Amendment. Basically, under this law voters in  
2 California have less rights than voters in the Soviet  
3 Union in the sense that the Soviet Union, you know, you  
4 have multiple-candidate elections which are not by party,  
5 to the extent they are now allowing multiple-candidate  
6 elections. Yet I am sure that if Gorbachev announced  
7 tomorrow that the Lithuanian Nationalists or the Georgia  
8 Nationalists could not endorse candidates, that President  
9 Bush and Jim Baker would be rightly protesting a violation  
10 of civil rights.

11 QUESTION: Well, to get a little closer to home,  
12 how do you distinguish this case from Austin v. The  
13 Michigan Chamber of Commerce?

14 MR. SMITH: How do I distinguish it?

15 QUESTION: Yes.

16 MR. SMITH: Easily. In Austin the problem was  
17 that -- there's two big things. One branch is that in  
18 Austin the prohibition wasn't as broad. Basically the  
19 corporation could set up a totally controlled PAC, and --  
20 to make contributions, and the corporation could make any  
21 endorsement it wanted. The corporation could send to its  
22 shareholders or members any expression it wanted on  
23 candidates. It simply -- in this case the political party  
24 cannot --

25 QUESTION: Well, but the Michigan statute

1 certainly prohibited the Michigan corporation in question  
2 from expressing itself in an election, and we said it was  
3 justified because the danger of corruption and because the  
4 State had given the corporation certain benefits.

5 MR. SMITH: Well, I said there are two  
6 distinctions, though. One is that the Michigan statute  
7 didn't go nearly as far as this provision does, because  
8 this is an absolute prohibition and this Court's opinion,  
9 as well as concurrence by Justice Brennan, were very  
10 explicit that they were saying it was not an absolute  
11 prohibition, because the Michigan corporation could set up  
12 a wholly controlled PAC. The Michigan corporation could,  
13 to its members, send any endorsement it wanted. And the  
14 Michigan corporation could endorse all it wanted, it just  
15 was limited in direct expenditure money from the corporate  
16 treasury.

17 The second point is what Austin and  
18 Massachusetts Citizens for Life make very clear is that  
19 the problem was not that the corporation got benefits,  
20 because there would not be necessity to exempt any  
21 corporations, including wholly political corporations. It  
22 was just mere receipt of benefits does it. The test was  
23 that it gave corporations advantage in the economic  
24 marketplace which would allow them to basically bring  
25 money over into the political marketplace. And that was



1 the quote, corruption, unquote, that the Court was  
2 concerned about.

3 QUESTION: Do you think corruption is the only  
4 evil that a State may strike at under that rubric?

5 MR. SMITH: I think corruption is the only one  
6 that has been recognized as legitimate so far, and I think  
7 that this provision is just so all encompassing. It's --  
8 it applies to all parties, major or minor, ballot  
9 qualified or nonballot qualified. It applies to all  
10 advocacy with respect to local, school, and judicial races  
11 whatsoever. The political parties --

12 QUESTION: It's practiced by the official party,  
13 isn't it? I don't suppose -- are the officers of the  
14 party forbidden to go out and campaign?

15 MR. SMITH: Well, even if they're not --

16 QUESTION: Are they or not?

17 MR. SMITH: I believe individually they could  
18 campaign, but --

19 QUESTION: But then, any organization besides  
20 the party can support these candidates, I suppose, in  
21 these nonpartisan elections, like the California  
22 Democratic Council?

23 MR. SMITH: Yeah, but that --

24 QUESTION: That's not an official party, but --

25 MR. SMITH: That's true.

1           QUESTION: So all organizations other than these  
2 officially recognized parties can campaign, endorse, and  
3 give money?

4           MR. SMITH: That's right. And that actually,  
5 though, underpoints the whole irrationality of the  
6 enactment.

7           QUESTION: Do you think the State of California  
8 could prohibit the justices of the Supreme Court of  
9 California from endorsing as a group a candidate for  
10 governor, one candidate or another?

11          MR. SMITH: I think, Your Honor, that the State  
12 might have greater ability to regulate the political  
13 activities of judges or judicial candidates than they  
14 could of the outside entities.

15          QUESTION: Why is that? Because they are part  
16 of the governmental process? And aren't parties part of  
17 the governmental process, as California has set it up?

18          MR. SMITH: Parties are part of the governmental  
19 process only insofar as they are allowed to make  
20 nominations for certain offices. And basically the, what  
21 -- there is no choice. If you have 1 percent of the  
22 registration you are automatically a qualified party in  
23 California, period. All it takes is 1 percent of the  
24 registration. You know, there's no, I don't even think  
25 there's a legal way that the Democratic or Republican

1 Party could, quote, withdraw, unquote, from, quote,  
2 accepting, unquote, the benefits that the petitioners  
3 talked about.

4 Because basically the test under California law  
5 is if you have 1 percent you're a ballot-qualified party.  
6 And the test also is, and with respect to a question that  
7 was asked earlier, under California law independent  
8 candidates cannot use any party designation. In a case  
9 called Libertarian Party v. Eu, the California Supreme  
10 Court squarely held that about 10 years ago. So  
11 basically, if you get 1 percent registration you are on  
12 the ballot as a party that nominates by primary. You must  
13 nominate by primary under the California Constitution.

14 QUESTION: 1 percent registration in what? I  
15 don't understand. You register in the primaries, don't  
16 you?

17 MR. SMITH: As soon as 1 percent of the voters  
18 register say that I want -- I am affiliated with this  
19 party or that party, as soon as 1 percent of the voters  
20 register a certain way, the party --

21 QUESTION: Do they have to honestly say whether  
22 they are affiliated with one party or another?

23 MR. SMITH: Under California law you have to  
24 actually -- under California law you have to fill out a  
25 voter registration card that says I affiliate with this

1 party or that party or --

2 QUESTION: Yeah, but I think it's -- isn't it up  
3 to the party whether they want to be a primary party or  
4 not, whether they want to play the primary game and get on  
5 the ballot?

6 MR. SMITH: No, they have no choice. If 1  
7 percent of the voters sign up --

8 QUESTION: Yeah, but they just tell their  
9 members, don't sign up. This party does not want to be on  
10 the primary ballot. We don't want to be a primary party.  
11 Couldn't they do that, and tell their voters don't  
12 affiliate for purposes of this registration? Can't they?  
13 Are you sure that they must say I --

14 MR. SMITH: If --

15 QUESTION: All right, you've got me, I'll tell  
16 the truth. I really am a member of the -- whatever -- the  
17 Surfers' Party. You have to say that?

18 MR. SMITH: All I am telling you is that once  
19 there is 1 percent the party is on the ballot and is in  
20 the scheme. And in fact once they're on, even if they  
21 fall below 1 percent, as long as they don't fall below  
22 something like one-fifteenth of a percent and they get at  
23 least 1 percent in some Statewide election, they stay  
24 qualified under the scheme. And that's how it works in  
25 California.

1           So there isn't this great choice, and as a  
2 practical matter I think that's just resuscitation of the  
3 old argument that if something's a privilege then you can  
4 condition speech on it. And I think this Court has in  
5 most contexts reject that -- rejected that argument rather  
6 squarely.

7           Because by the same argument, I guess, anyone  
8 who got a -- you know, you have Federal law saying anyone  
9 who got a patent couldn't support any candidate for any  
10 Federal office. Or anyone who got a student loan couldn't  
11 be involved in any public political activities. So I  
12 don't think --

13           QUESTION: We have rejected it in most contexts.  
14 The question is whether this is one of those in which we  
15 should reject it. We haven't rejected it in all.

16           QUESTION: We have upheld the Hatch Act, for  
17 example.

18           MR. SMITH: Well, I believe that naturally, if  
19 you look at the cases coming after that, like Connick,  
20 it's clear that the rationale is the government has --  
21 that the government is supposed to have the same kind of  
22 control over its employees that a private employer might.  
23 And obviously the employment relation implies a certain  
24 degree of control that I think contributing or supporting  
25 a political organization doesn't. And MCLF is an

1 authority on that, that a contributor or supporter can't  
2 expect to control a lot of the workings of the political  
3 organization.

4 QUESTION: Thank you, Mr. Smith.

5 Mr. Chao, we'll hear now from you.

6 ORAL ARGUMENT OF CEDRIC C. CHAO  
7 ON BEHALF OF THE CALIFORNIA  
8 DEMOCRATIC PARTY, ET AL.,  
9 AS AMICI CURIAE, SUPPORTING THE RESPONDENTS

10 MR. CHAO: Mr. Chief Justice, and may it please  
11 the Court:

12 One of the first indications that democracy was  
13 arriving in Eastern Europe last year was the formation of  
14 political parties. As the Ninth Circuit noted in its Eu  
15 decision, political parties are nothing more than  
16 voluntary associations of individuals who band together in  
17 pursuit of shared political goals. Political parties can  
18 succeed in the political marketplace only if their vision  
19 of society attracts a majority of the population. And  
20 that is why this boogie-man of the party dominance makes  
21 no sense.

22 If voters like the message and they accept the  
23 message, then they will accept the candidates of that  
24 particular party and the programs of that particular  
25 party.

1 QUESTION: And I take it if a judge doesn't want  
2 to have an endorsement he'll say a plague on all your  
3 houses, I don't want any endorsements?

4 MR. CHAO: That's absolutely correct, Your  
5 Honor. Section 6(b) --

6 QUESTION: Do you think, Mr. Chao, that the  
7 Democratic Party could insist that it be able to nominate  
8 a candidate for the county board of supervisors, or  
9 whatever it is that's now nonpartisan in San Francisco?

10 MR. CHAO: Well, under the nonpartisan  
11 nomination process the answer is no. They do not have,  
12 they do not control access to the ballot.

13 QUESTION: Well, would you -- might not your  
14 argument lead to the conclusion that they have a  
15 constitutional right not to be excluded from competition  
16 for that office?

17 MR. CHAO: Well, that issue is not before the  
18 Court.

19 QUESTION: No, but I would be interested in your  
20 answer to it.

21 MR. CHAO: I think that would be difficult to  
22 say, Your Honor. I do think it would be difficult to say.  
23 I would like to --

24 QUESTION: (Inaudible) offset in either way?

25 MR. CHAO: Either way, Your Honor.

1 QUESTION: So you don't think your argument --  
2 don't you think your argument here bears on that issue,  
3 though?

4 MR. CHAO: I don't believe directly so, and I  
5 don't think we're taking it that far, Your Honor. I think  
6 what is at issue squarely in this case is whether, given  
7 the fact that there are elections, whether they be  
8 partisan or nonpartisan, where the political parties have  
9 an equal right to every other entity and individual in  
10 society to speak their piece, to say this candidate is  
11 qualified, this candidate is worthy of your support, and  
12 that's really what's before us.

13 QUESTION: And to contribute money?

14 MR. CHAO: As well as contribute money, support  
15 and oppose. That's correct, Your Honor.

16 QUESTION: Do you think that the State could  
17 prohibit the candidate from including that endorsement in  
18 the statement that's sent out to voters at public expense?

19 MR. CHAO: I do not believe so, Your Honor.  
20 That is not before the Court in this case --

21 QUESTION: Well, it's what gave rise to the  
22 lawsuit, though.

23 MR. CHAO: That is in a different portion of  
24 this lawsuit. That's correct. Section 6(b) --

25 QUESTION: Your position is the Democratic or



1 Republican Party cannot be prohibited from giving money to  
2 judicial candidates in California?

3 MR. CHAO: That is correct, Your Honor, under  
4 the present -- that's correct.

5 Section 6(b) is --

6 QUESTION: Are they -- I take it they're not  
7 permitted to now?

8 MR. CHAO: Under section 6(b) they are not  
9 permitted, that is correct.

10 QUESTION: And this could go for retention  
11 elections, which are the only kind of elections there are,  
12 I guess?

13 MR. CHAO: That is correct, with the exception,  
14 Your Honor, that for certain of our trial courts a  
15 challenger can take on an incumbent judge.

16 QUESTION: Okay.

17 MR. CHAO: And in fact that did happen in  
18 November 1990.

19 Section 6(b) is quite dangerous. In California  
20 there are 19,279 elective offices. Of those offices, only  
21 179 are partisan. What section 6(b) then does is it says  
22 that political parties may be silenced on the issue of  
23 political candidates in over 99 percent of elective  
24 offices in California, which goes to one of the major  
25 reasons for the existence of political parties, namely the

1 ability to evaluate candidates for public office and to  
2 decide whether they are worthy of support or not.

3 Section 6(b) is equally an egregious burden on  
4 the right of the voters and of party members to receive  
5 information in elections. And, as this Court has held  
6 repeatedly, one of the purposes of the First Amendments in  
7 the political marketplace is to ensure that voters receive  
8 as much information as possible in order to intelligently  
9 exercise the right of franchise.

10 Just two terms ago --

11 QUESTION: I mean, on the information point, do  
12 you agree with the answer that your opponent gave with  
13 regard to what is prohibited by this law? That is to say  
14 the political party is not only prohibited from saying the  
15 Republican Party endorses so and so, but it cannot even  
16 put out a brochure at its expense describing what a  
17 terrific candidate this is? It cannot even spend any  
18 money to circulate information on this person's behalf,  
19 information apart from the party endorsement?

20 MR. CHAO: The statute reads not only endorse,  
21 Your Honor, but also support and oppose. And I do not  
22 quarrel with my opponent's interpretation of support to --

23 QUESTION: It doesn't mean officially support  
24 necessarily? It means contribute anything to his support?

25 MR. CHAO: We do not quarrel with that

1 interpretation, Your Honor, and that is one of the reasons  
2 why we think the statute is, the burden of the statute is  
3 very, very broad. The -- just two terms ago in Eu, it was  
4 held that the First Amendment protects the rights of  
5 political parties to endorse candidates to speak on  
6 candidates running in party primaries. I submit that is  
7 difficult to see how the rationale of Eu does not apply  
8 with equal force to nonpartisan elections.

9 I would like to address -- I think there is a  
10 very fundamental misconception, a very fundamental  
11 confusion in the compelling argument put forth by the  
12 petitioner. Their primary compelling interest, they  
13 assert, is the impartial administration of government, and  
14 that found that on the Letter Carriers decision. But I  
15 submit that he is -- that petitioner has confused two very  
16 distinct concepts. On the one hand, as Letter Carriers  
17 spoke, there is an interest in the impartial execution of  
18 the laws, which meant the execution and enforcement of  
19 laws without bias or favoritism toward any party or  
20 member. In a local context that would mean whether I  
21 supported the winning or losing candidate for mayor, I  
22 have an equal expectation that my garbage will be picked  
23 up once a week just like everybody else.

24 The concept that they tried to throw in to bring  
25 into Letter Carriers rationale is impartial policy making.

1 They would have -- they argue that there's only one right  
2 way to run a city or a county. And they also argue that  
3 parties, based on evidence of 100 years ago, are these  
4 engines of evil, and therefore parties are driven to  
5 pressure the local official to act in a way to decide a  
6 policy that is not the right way.

7 I submit that their syllogism is fatally  
8 incorrect. There is not one right way to run a city or a  
9 county. There are many ways to run a county --

10 QUESTION: Well, are you saying that there is no  
11 State interest in having what are called nonpartisan  
12 offices?

13 MR. CHAO: There is no compelling interest in  
14 having a nonpartisan office. A nonpartisan, the  
15 nonpartisan method of putting candidates on the ballot is  
16 merely one vehicle. They -- California has chosen on a  
17 nonpartisan nomination process. Other States have done  
18 that and other States have chosen a partisan method of  
19 putting both judicial office holders and other office  
20 holders on the ballots. Nonpartisanship --

21 QUESTION: I'm not quite sure I understand. So  
22 there is no governmental interest in having nonpartisan  
23 judicial elections?

24 MR. CHAO: I would submit that is correct.  
25 There is -- California is free to determine that we will

1 put judges on the ballot on a nonpartisan basis. But I  
2 would submit that the nonpartisan election by its, in and  
3 of itself, is not a compelling interest in the First  
4 Amendment structure.

5 QUESTION: Well, what do you mean that  
6 California has an interest in putting them on the ballot  
7 on a nonpartisan basis? How can they have that interest  
8 if on the other hand the candidate has the right to  
9 identify -- does a, let me put it this way, does a  
10 judicial candidate have a constitutional right to identify  
11 his party, say I am a Republican or I am a Democrat?

12 MR. CHAO: On the ballot, Your Honor?

13 QUESTION: Yes.

14 MR. CHAO: I would, I would say yes, Your Honor.

15 QUESTION: So that's your submission to this  
16 Court?

17 MR. CHAO: Yes, Your Honor. If I could return  
18 to Letter Carriers for just a short minute, Los Angeles  
19 County has a population of approaching 9 million people.  
20 It is larger than the population, it has a population  
21 larger than that of 42 other States in this country. The  
22 leaders of Los Angeles County and all the other cities and  
23 counties of this, of our State, face very controversial,  
24 very difficult policy choices every day. And there is no  
25 one right way to make those choices.

1           The elections of the leaders of these cities and  
2 counties necessarily will involve discussions about both  
3 the voters' views and the candidates' views of these  
4 policy choices. It is expected, the voters expect that  
5 there will be discussions, or how else will they make a  
6 decision on who to, with respect to who to vote for. In  
7 these discussions political parties historically in our  
8 country have played a very important role, and we submit  
9 that section 6(b), by taking away that role, does great  
10 disservice to the First Amendments.

11           Petitioner ignores the fact that in *Brown v.*  
12 *Hartlage* it was recognized that candidate commitments  
13 enhance the accountability of government officials to the  
14 people that they represent, and assist the voters in  
15 predicting the effect of that votes. This Court also held  
16 in *Brown v. Hartlage* that some promises are universally  
17 acknowledged as legitimate, indeed indispensable to  
18 decision making in a democracy.

19           If in my remaining time I could speak very  
20 briefly to the issue of judicial elections, States  
21 throughout our Nation employ many different methods of  
22 selecting and retaining judges. Every method has its  
23 advantages, and of course plenty disadvantages.  
24 California has opted for a system where we have retention  
25 elections, and in some cases contested elections. The

1 necessary result of that selection is that there will be  
2 discussion about judges, discussion of their records,  
3 discussion of their qualifications.

4 The asserted threat to judicial independence, of  
5 which petitioners speak of, is attributable not to the  
6 fact that political parties may participate in that  
7 process, but rather to the underlying decision to subject  
8 judges to elections in the first place. Perhaps the most  
9 dramatic episode of the asserted threat to judicial  
10 independence was in 1986 retention elections in which  
11 three justices of our supreme court were defeated. \$7  
12 million were raised by various special interest groups to  
13 defeat those justices, and it was, there were commercials,  
14 there were discussions focused on their views on the  
15 record, and specifically on the death penalty.

16 Voters cast those three justices out of office  
17 and, as Justice Groton wrote in adjudicature article, the  
18 polls indicated that the basis for casting those three  
19 justices out was not integrity or competence, but rather  
20 their death penalty position. I raise this issue because  
21 political parties in 1986 did not play a role in those  
22 elections, and that illustrates the gross under-  
23 inclusiveness of this statute.

24 Petitioner also ignores the fact that both  
25 Bridges v. California and Craig v. Harney teach that we

1 should presume that judges are able to withstand criticism  
2 and are able to withstand pressures in elections. Even  
3 the California Judges' Association, which adopted the  
4 California Judicial Code, has the same presumption. In  
5 the Judicial Code it states, and I quote, "judges should  
6 be unswayed by partisan interests, public clamor, or fear  
7 of criticism," end quotes. I submit that to assume that  
8 judges are not persons of fortitude, able and willing to  
9 withstand the pressure of the electoral marketplace, is to  
10 do them a great disservice. In closing I would submit to this Court that  
11 First Amendment jurisprudence teaches us that the free  
12 flow of information, particularly with respect to  
13 candidacies, particularly with respect to governmental  
14 affairs, is essential to our democracy and must be  
15 protected. I submit that it would be wrong as a matter of  
16 law and as a matter of public policy to silence political  
17 parties on the very issue that they were formed to  
18 address. I would request that the Ninth Circuit's  
19 decision be affirmed. Thank you.

20 QUESTION: Thank you, Mr. Chao.  
21 Mr. Aftergut, do you have rebuttal? You have 4  
22 minutes remaining.

23 REBUTTAL ARGUMENT OF DENNIS AFTERGUT  
24 ON BEHALF OF THE PETITIONERS



1 MR. AFTERGUT: I do, Mr. Chief Justice. First a  
2 couple of very quick just factual points.

3 Justice Stevens, it was this part of the case  
4 which arose in the context of a -- of an endorsement that  
5 was sought to be placed inside the voter pamphlet, as the  
6 third cause of action states. And I don't remember which  
7 Justice asked the question about whether this was, 6(b)  
8 was the only basis for taking that endorsement out, but  
9 California Elections Code section -- now I seem to have  
10 lost it, 10,012, states that the -- a candidate statement  
11 shall not include the party affiliation of the candidate  
12 or membership of activity in partisan and political  
13 organizations.

14 QUESTION: And that provision is not challenged  
15 in this case?

16 MR. AFTERGUT: That's correct, Your Honor. The  
17 point that was made about the Democratic Party, if it  
18 collects 1 percent of the vote, the State makes the party  
19 remain an official party, I submit is an absurd  
20 proposition. If the party does not wish to be an official  
21 party and participate in the primary system, it can  
22 collect 10 percent of the vote, the State does not force  
23 it to participate in the party system.

24 There was a question about corruption being the  
25 only justification. Corruption has not been the only

1 justification for upholding State regulations of First  
2 Amendment rights. The ballot access case is Jenness,  
3 Storer, and so forth, American Party v. Texas, v. White.  
4 Those are cases which deal with what is at issue here, a  
5 State's structuring of its electoral system. And what  
6 those cases recognize is that when the First Amendment,  
7 when the associational rights and the rights of political  
8 groups to communicate with their members, when the First  
9 Amendment interests meet the practical realities of  
10 structuring a governmental system, the Court looks at the  
11 structural system with greater deference and tends to  
12 uphold those unless they are arbitrary or unreasonable.  
13 And that's basically what all of the arguments  
14 of, my opponents ignore is the structural interest that  
15 section 6(b) serves. And as an example, Mr. Chao says  
16 that it's, he's very hard pressed to distinguish this case  
17 from Eu, that is Eu doesn't refer to nonpartisanship or  
18 partisanship. But if the Court looks at how Eu justified,  
19 how it rejected the compelling interest that the State  
20 offered, the Court rejected the Attorney General of  
21 California's reliance on Storer for the proposition that  
22 the measure there promoted political stability.

23 The Court said this measure only promotes party  
24 stability, not political stability. And what the Court  
25 said is that Storer does not stand for the proposition

1 that a State may enact election laws to mitigate intra-  
2 party factionalism during a primary campaign. And the  
3 Court said preserving party unity during a primary is not  
4 a compelling State interest. We're not trying to preserve  
5 party unity. We're trying to preserve California's system  
6 of nonpartisanship.

7 And basically the danger here that we seek to  
8 avoid is that parties that have chosen to accept State  
9 conferred benefits have an enhanced voice. The State  
10 weighs in. And particularly where those -- where that  
11 advantages converges in single party localities, they --  
12 parties can skew the debate. It's not that parties have  
13 an equal voice. Parties have an advantage by the State.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
15 Aftergut.

16 The case is submitted.

17 (Whereupon, at 1:58 p.m., the case in the above-  
18 entitled matter was submitted.)

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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: 90-769*

LOUISE RENNE, SAN FRANCISCO CITY ATTORNEY, ET AL., Petitioners

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v. BOB GEARY, ET AL.

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

BY *Raymond H. Hartel*  
(REPORTER)

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