

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ALAN B. BURDICK, Petitioner v. MORRIS TAKUSHI,
DIRECTOR OF ELECTIONS OF HAWAII, ET AL.

CASE NO: 91-535

PLACE: Washington, D.C.

DATE: March 24, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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ALAN B. BURDICK, :
Petitioner :
v. : No. 91-535
MORRIS TAKUSHI, DIRECTOR OF :
ELECTIONS OF HAWAII, ET AL. :

- - - - -X
Washington, D.C.
Tuesday, March 24, 1992

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

APPEARANCES:

ARTHUR N. EISENBERG, ESQ., New York, New York; on behalf
of the Petitioner.
STEVEN S. MICHAELS, ESQ., Deputy Attorney General of
Hawaii, Honolulu, Hawaii; on behalf of the
Respondents.

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1 PROCEEDINGS

2 (10:11 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 91-535, Alan B. Burdick v. Morris Takushi.

5 Mr. Eisenberg.

6 ORAL ARGUMENT OF ARTHUR N. EISENBERG

7 ON BEHALF OF THE PETITIONER

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

10 At issue in this case is the constitutionality
11 of Hawaii's total prohibition against write-in voting.
12 This case began in 1986. In the general election that
13 year held in Hawaii with respect to State legislative
14 offices, one-third of those elections were uncontested; a
15 single candidate was running unopposed.

16 And that pattern of uncontested elections was
17 consistent with the pattern that prevailed in the 1982
18 elections and in the 1984 general elections with respect
19 to State legislative offices.

20 One of the uncontested elections in 1986
21 occurred in the State legislative district, the State
22 House of Representatives district in which Mr. Burdick
23 lived. A single candidate was running unopposed. Mr.
24 Burdick had no interest in voting for that candidate. He
25 did, however, want to participate in the election, and he

1 saw his only opportunity to participate as the casting of
2 a write-in ballot to express his opposition to the single
3 candidate running unopposed, and to express support for an
4 alternative candidate.

5 Hawaii, unfortunately, has a total prohibition
6 against all write-in voting in all elections and under all
7 circumstances, and that total prohibition was invoked to
8 bar his right to exercise a write-in ballot. This total
9 prohibition, therefore, denied Mr. Burdick the opportunity
10 to vote for the candidate of his choice, or in the
11 alternative, to cast a ballot as a protest vote.

12 Moreover, one of the unique functions of
13 write-in voting in our society is that it serves as a
14 safety valve mechanism, to permit voters to respond to new
15 issues or changed circumstances that arise after the close
16 of the petitioning period but before the election.

17 In this case, Mr. Burdick did not realize that a
18 single candidate was running unopposed until the close of
19 the petitioning period and still Hawaii invoked its total
20 prohibition against write-in voting, even to deny the use
21 of the write-in ballot as a safety valve mechanism.

22 QUESTION: Mr. Eisenberg, are you asserting the
23 right just to make a write-in vote for someone who would
24 otherwise be qualified to be on the ballot?

25 MR. EISENBERG: We think that Mr. Burdick has a

1 right to vote for somebody who is unqualified as well as
2 for somebody who is qualified. We think that if Mr.
3 Burdick --

4 QUESTION: For someone, who under State law
5 could not qualify to occupy the office?

6 MR. EISENBERG: That's right. In that instance,
7 the vote would simply be a protest vote, a vote no.

8 QUESTION: Donald Duck.

9 QUESTION: Mickey Mouse, Donald Duck, whatever,
10 that is fine. You are claiming that right?

11 MR. EISENBERG: We are claiming that the
12 individual has a right to vote for Mickey Mouse or Donald
13 Duck. How the State chooses to record that vote is --

14 QUESTION: I suppose that anyone can write
15 something on the ballot. Now you are going further than
16 that, you want the State to have to count it?

17 MR. EISENBERG: Well, there are several things
18 that are implicated in the phrase, count it. We don't
19 insist that Mr. Burdick has the right to have somebody who
20 is ineligible to hold office, hold office. So his vote
21 isn't counted towards the election of that person.

22 But we do think that the right to vote embraces
23 both a right to choose, and if there is no meaningful
24 choice, a right to say no, and if Mr. Burdick chooses to
25 say no by voting for an unqualified candidate or a

1 fictional character, Mr. Burdick can do so. The State
2 should record his vote, we think, as a protest vote. The
3 State has an obligation to record that vote as a protest
4 vote.

5 QUESTION: You mean quite literally to set up a
6 column in the returns that it gives to the reporters and
7 certifies, to set up a column as protest vote?

8 MR. EISENBERG: Well, there are several
9 approaches. The State of Virginia simply records every
10 vote as it is written in, so that if somebody votes for a
11 fictional character, if somebody votes for an unqualified
12 candidate --

13 QUESTION: You think the Constitution requires
14 every State to do that?

15 MR. EISENBERG: We think that the Constitution,
16 at the very least, requires that the State acknowledge the
17 protest vote, the vote no. We think if elections are
18 about voting either in support or against candidates, then
19 the vote against a candidate must be recorded somehow. It
20 needn't have a full list --

21 QUESTION: Just a minute, I am trying to ask you
22 a question.

23 MR. EISENBERG: I am sorry. I am sorry.

24 QUESTION: What provision of the Constitution do
25 you think it is that requires that?

1 MR. EISENBERG: We think that the textual source
2 of our constitutional claim is either the First Amendment
3 or the equal protection clause.

4 QUESTION: Have we ever held that the First
5 Amendment establishes a right to vote?

6 MR. EISENBERG: Well, we have --

7 QUESTION: Have we?

8 MR. EISENBERG: We have used the equal
9 protection clause to find that there was a right to a
10 meaningful vote.

11 QUESTION: I wasn't asking you about the -- I
12 didn't ask you about the equal protection, I asked you
13 about the First Amendment.

14 MR. EISENBERG: Well, I think we have talked
15 about the First Amendment right of political participation
16 in a number of cases, and in Anderson against Celebrezze,
17 the Court identified the right to vote, the right to run
18 for office, the right to associate in support of a
19 candidate, all as an amalgam of rights protected by the
20 First Amendment.

21 QUESTION: Is the theory behind your answer a
22 theory of effective franchise or solely a theory of First
23 Amendment expression, in effect, quite independent of the
24 act of voting?

25 MR. EISENBERG: I think, Your Honor, it is both.

1 It involves the right to cast a meaningful ballot, which
2 is in some sense, the right of effective franchise.

3 QUESTION: Well, to the extent that your
4 argument is based on a meaningful ballot kind of argument,
5 why should the standards be any different from -- or
6 perhaps you are not saying they should be, but should the
7 standards be any different from the ballot access cases?

8 MR. EISENBERG: We think that the overarching
9 standard employed by this Court even in ballot access
10 cases generally is Anderson against Celebrezze which --

11 QUESTION: Do you think under the ballot access
12 cases, we will assume it is some real individual, not
13 Donald Duck, decided at the same time your client did that
14 he would like to be on the ballot and came forward under,
15 given the statutory scheme of Hawaii, that he would have
16 any claim on the ballot access theory?

17 MR. EISENBERG: Well, we think that he may or
18 may not have a claim under a ballot access theory, but
19 that is because there are very different interests that
20 apply when the State is regulating access to the ballot in
21 a formal printed way.

22 QUESTION: Well, but the fact is that the
23 ultimate value to be served by ballot access is effective
24 franchise. I mean, it is ultimately a public interest and
25 not merely the interest of the individual who wants to be

1 on the ballot, and bearing that in mind, number 1,
2 shouldn't the standards be the same whether we are dealing
3 with a person who wants to be on the ballot or the person
4 who wants to write in a name. Wouldn't you agree that
5 they should be essentially the same standards?

6 MR. EISENBERG: We do agree that the standards
7 are the same, and the standard is Anderson against
8 Celebrezze.

9 QUESTION: Now if they are the same standards,
10 isn't it clear that under the Hawaii statute, the access
11 to the ballot is sufficiently free so that the individual
12 who 'woke up after the primary period and said, gee, nobody
13 is running, I want my name on there, that individual
14 wouldn't have any claim under the -- given the Hawaii
15 statute.

16 MR. EISENBERG: Well, we think that that
17 individual should have a claim, because we think that
18 write-in voting provides an important safety valve
19 mechanism which should be recognized --

20 QUESTION: So that you basically want us to
21 expand the law, not merely with respect to somebody who
22 wishes to write in, but you want us to expand ballot
23 access law beyond any point that it has reached thus far.

24 MR. EISENBERG: Well, ballot access law as we
25 have generally understood it involves regulating the

1 formal printed ballot.

2 QUESTION: What's the answer to my question? I
3 mean, you do basically want an expansion of ballot access
4 from anything that our cases have held up to this point,
5 isn't that correct?

6 MR. EISENBERG: If ballot access is to be
7 defined more broadly, as Your Honor is suggesting, yes,
8 that is correct.

9 QUESTION: I thought you were accepting that.

10 MR. EISENBERG: That would be correct, but we
11 think that the overarching standard is the Anderson
12 against Celebrezze standard, which requires in this
13 instance the State of Hawaii to come forward with some
14 showing that the total prohibition that it imposes is
15 necessary to the advancement of some substantial
16 governmental interest, and that is a showing that the
17 State of Hawaii cannot make in this case. That is a
18 showing that the State of Hawaii has not made in this
19 case.

20 Hawaii advances four interests in support of its
21 claim. First, an interest in limiting factionalism by
22 prohibiting sore-loser candidacies; second, an interest in
23 protecting political parties against interparty raiding;
24 third, an interest in an informed electorate; fourth, an
25 interest in protecting Hawaii's runaway election

1 provisions.

2 QUESTION: With respect to each of those
3 interests, do we apply strict scrutiny, rational-basis
4 scrutiny or some other form of scrutiny to assessing the
5 validity of Hawaii's interest?

6 MR. EISENBERG: We think we apply Anderson
7 against Celebrezze with teeth, which approaches strict
8 scrutiny, which is the standard imposed in Tashjian and in
9 Eu.

10 QUESTION: Is that under the First Amendment
11 prong of your argument or under the right-to-vote prong?

12 MR. EISENBERG: The Court has in Anderson and
13 most recently in Norman against Reed suggested that while
14 it looks first these days to the First Amendment as the
15 source, as the textual source for the protection of the
16 rights of electoral participation, it would reach the same
17 result under the equal protection clause, and it doesn't
18 much matter whether you call it a right to vote or an
19 equal right to vote.

20 In both instances, we think that Hawaii is
21 obligated to show that the total prohibition is necessary
22 to the advancement of substantial governmental interests,
23 and it has not made that showing in this case.

24 The interest in an informed electorate, while a
25 worthwhile goal, cannot justify Hawaii's blanket

1 prohibition, even in circumstances where there are no
2 sore-loser candidates. If the State is concerned about
3 sore-loser candidates it can enact a narrow sore-loser
4 provision.

5 The interest in protecting parties against
6 interparty raiding has no application whatever to a
7 prohibition that would be extended to a general election.
8 Interparty raiding is a concern about voting in primary
9 elections. So again, Hawaii's total prohibition sweeps
10 too broadly.

11 We think that there is another consideration in
12 this regard, and that is that at least one of the three
13 established parties in Hawaii, the Libertarian Party, has
14 now expressly requested that voters in its primary
15 elections be permitted to cast write-in ballots. So
16 Hawaii, it seems to us, now has a Tashjian problem, a
17 problem confronted by this Court in Tashjian where the
18 State, in that instance, the State of Connecticut, was
19 imposing a restrictive measure on ballot access, and even
20 in circumstances where the party had no interest in the
21 protection that the State was affording it.

22 And so for these reasons we think that the
23 interest in protecting against interparty raiding is
24 insufficient in this case.

25 The interest in an informed electorate, again,

1 while a worthwhile goal, we think cannot be justified
2 here. If the State is concerned about voters voting in an
3 ignorant way, that concern seems improbable, because it is
4 not likely that somebody is going to vote for somebody
5 that they know nothing about, when you have to actually go
6 to the trouble of casting a write-in ballot.

7 If the concern is for the --

8 QUESTION: Isn't it likely that a write-in voter
9 is probably better informed than other voters?

10 MR. EISENBERG: It is likely that a write-in
11 voter who goes to the trouble of casting a write-in vote
12 is better informed than other voters. '

13 Moreover, if the State were concerned about the
14 body politic in general, that is to say, if the State were
15 concerned that everybody ought to know that are
16 surreptitious write-in candidates afoot, then the State
17 can do, the State of Hawaii can do what approximately 20
18 other States do: it can require that write-in candidates
19 file a declaration of candidacy shortly before the
20 election.

21 This mechanism satisfies the safety valve
22 concern. It allows write-in candidates to enter the race
23 after the petitioning process is closed where new
24 circumstances or new issues arise, and it provides that
25 flexibility. And if the State were concerned about an

1 informed electorate in that regard, informing the
2 electorate that there are other write-in candidates or
3 indeed there are other candidates beyond those who are
4 simply listed on the ballot, Hawaii can do, as I say, what
5 20 other States have done.

6 Finally, the interest in protecting Hawaii's
7 runaway election provisions cannot justify Hawaii's
8 policy. To the degree that Hawaii has abolished general
9 elections in these circumstances, there is no occasion to
10 cast a write-in ballot, so this last concern about Hawaii,
11 this concern about their provisions with respect to
12 runaway elections, is irrelevant.

13 In fact, Hawaii's runaway election provisions,
14 provisions which permit a candidate who emerges from the
15 primary election as a victor and unopposed for at least
16 county offices and State legislative offices, not to have
17 to stand for election in the general election, that
18 provision argues more forcefully in favor of a right to
19 cast a write-in ballot in these dispositive primary
20 elections, because in Hawaii, given the pattern of
21 uncontested elections, and given these runaway election
22 provisions, the right to cast a write-in ballot at the
23 primary level is very, very important.

24 With the Court's permission, I should like to
25 reserve --

1 QUESTION: May I ask a question, just to be sure
2 I understand your position. Do you think that Hawaii
3 could prohibit anyone from qualifying for and holding
4 office unless they have followed Hawaii's procedure for
5 getting on the election ballot?

6 MR. EISENBERG: If Hawaii had a write-in
7 candidate registration requirement, a requirement that a
8 write-in candidate declare and if the candidate fails to
9 comply, it seems to us that Hawaii can do what these 20
10 other States do, which is to declare the individual
11 ineligible to hold office. We have no quarrel with that.

12 QUESTION: But if it were a -- not a voter
13 standing here today, but someone who would like to be a
14 candidate and hold office, you would take the position
15 that Hawaii's present laws concerning who goes on the
16 general election ballot and therefore who can serve in
17 those offices on the ballot, you would take the position
18 that that is unconstitutional?

19 MR. EISENBERG: We think to the degree that
20 Hawaii does not provide for the safety valve mechanism of
21 a write-in ballot, to permit the candidate, in Your
22 Honor's hypothetical, to enter the race as a write-in
23 candidate after the petitioning period is closed, which in
24 Hawaii is 60 days before the primary election, 105 days
25 before the general election, we think that Hawaii's

1 provisions are too restrictive.

2 QUESTION: And how many States have similar
3 prohibitions against all write-in? Is that a total of
4 five States?

5 MR. EISENBERG: There is a total of -- there are
6 four States that by statute prohibit write-ins and we are
7 informed that Louisiana, as a matter of practice, also
8 prohibits write-in voting.

9 QUESTION: Is it part of your case that the
10 State has to count these votes or does the State just have
11 to allow them to be cast?

12 MR. EISENBERG: We think that the State has to
13 count the votes, clearly a vote for a qualified candidate
14 should surely be counted. But we also think that the
15 State should have to count the protest vote, the vote no.
16 The State may be able to put it into a broad category of
17 no votes, but the State has to recognize that there is a
18 body of dissenters out there who don't like the choices
19 that have been provided to them.

20 QUESTION: Why does it have to provide this
21 forum for the dissenters in its election machine? What if
22 the State says, gee, it's just a lot cheaper to buy time
23 for them on some television channel, so election eve,
24 everybody who wants to vote no will be given time to come
25 in and protest?

1 MR. EISENBERG: Because voting is about voting
2 for or against the candidates who are holding themselves
3 up --

4 QUESTION: Voting is about getting somebody
5 elected. It's about choosing someone to govern you. It's
6 not about protesting it.

7 MR. EISENBERG: We think, Your Honor, that it is
8 about both. And in fact, this Court has recognized that
9 the electoral process extends beyond simply choosing
10 somebody who is going to get elected. In Anderson against
11 Celebrezze, this Court recognized the important expressive
12 aspects of the electoral process, engendering new issues
13 into the process, in putting forth new ideas.

14 And so this Court has granted First Amendment
15 recognition to --

16 QUESTION: How did we recognize that in
17 Anderson?

18 MR. EISENBERG: Well, because -- there was a
19 great deal of discussion of the role of third parties and
20 what the Court called third-force candidacies in talking
21 about the importance of John Anderson's campaign in 1980.

22 QUESTION: Well, sure, but the importance there
23 is that by discussing different issues, you may elect a
24 different person. There is nothing in that opinion that
25 suggests anything about the ability of the people to

1 protest, to use the election as a protest mechanism, is
2 there?

3 MR. EISENBERG: Not specifically, Your Honor.
4 But the very definition of an election, in our view,
5 embraces the right to choose and again, if there is no
6 meaningful choice, the right to say no, and that right to
7 say no has to be reflected somewhere on the books of the
8 State.

9 It is a very dangerous notion, both in First
10 Amendment terms and in terms of higher democratic values,
11 for the State to try to sweep that dissent under the rug,
12 to pretend it doesn't exist.

13 When Hawaii says to Mr. Burdick, in the interest
14 of promoting consensus, you can vote for only one
15 candidate or not vote at all, consensus may be a very
16 valuable interest, but consensus depends upon consent, and
17 the State has an obligation as well to recognize the
18 dissenting members of its society in the important aspect
19 of voting.

20 QUESTION: Mr. Eisenberg, if the essence of your
21 claim is the right to be heard in saying no, why isn't the
22 statement of no sufficiently recorded simply if the State
23 records a blank ballot? By doing that, they are saying,
24 he has said no to the candidate on the ballot.

25 MR. EISENBERG: Because a blank ballot signifies

1 more than a vote no. A person can simply fail to vote
2 because they overlooked that particular election on the
3 ballot. The voter may have simply --

4 QUESTION: Yes, and the voter may get the name
5 wrong when the voter writes the name in. I mean, no
6 method of expression is absolutely foolproof, but by and
7 large everybody understands that most people don't cast
8 blank ballots unless they do so for the sake of saying, I
9 don't want to elect any of these people. And isn't that
10 expression recorded when either a blank ballot is recorded
11 as such or the State simply says there were X ballots cast
12 and the total of votes for the candidate is something less
13 than that?

14 MR. EISENBERG: We think that -- Hawaii does
15 count blank ballots, Your Honor, but we think that a blank
16 ballot is not sufficiently understood as a dissent because
17 there may be a variety of reasons why an individual may
18 leave the place blank. The person may have forgotten.
19 The person may have reached no conclusion, but an
20 expression of dissent is clear and it ought to be
21 recognized.

22 QUESTION: Did you say there were 5 States that
23 currently don't allow write-ins. What is the historical
24 practice? Is it a relatively new phenomenon, not to allow
25 write-ins?

1 MR. EISENBERG: No, actually, at least one of
2 the States that prohibits write-ins has prohibited it from
3 the inception of the Australian ballot. Most States, as
4 we indicated in our brief, responded to the Australian
5 ballot reform, to the State-prepared ballot, by
6 recognizing that there had to be some sort of safety valve
7 mechanism, both for the reasons I have suggested and to
8 give flexibility to the electoral process, to give the
9 voter an opportunity to choose, but some --

10 QUESTION: And before the Australian ballot, you
11 could always, of course, cast a vote for whomever you
12 wanted.

13 MR. EISENBERG: That's correct. That is our
14 understanding of the history. And with the advent of the
15 Australian ballot, the question of how voter choice would
16 ultimately be recognized, and most States recognized that
17 write-in votes preserve voter choice. But a few States
18 did not even at the outset.

19 And in Oklahoma, for example, the interpretation
20 by case law was that a write-in was a defacement of the
21 ballot and therefore voided the ballot. And in South
22 Dakota, I don't quite, Your Honor, remember the basic
23 reason, but it was a turn-of-the-century decision of the
24 highest court in that State.

25 With the Court's permission, I would still like

1 to reserve the balance of my time.

2 QUESTION: Very well, Mr. Eisenberg.

3 Mr. Michaels, we will hear from you.

4 ORAL ARGUMENT OF STEVEN S. MICHAELS

5 ON BEHALF OF THE RESPONDENTS

6 MR. MICHAELS: Thank you, Mr. Chief Justice, and
7 may it please the Court:

8 At the outset of our argument, we would like to
9 emphasize three very brief points that we would like to
10 carry through our discussion with the Court, and which we
11 would urge the Court to keep in mind as it deliberates
12 upon this important case.

13 First, Hawaii is simply not in a small minority
14 of States when it comes to the issue that is actually
15 presented by this case, because rather than the mere 4
16 States that Mr. Eisenberg refers to, well over 30 States,
17 and in fact, by our count, 37 States do not permit what
18 Mr. Burdick claims the Constitution compels, namely the
19 right at primaries and general elections to vote for
20 whomever one pleases.

21 Second, if this case is about voting, then this
22 case is governed by this Court's ballot access decisions.
23 Voting is very different from generalized speech. It is
24 the casting of legally effective speech, and under the
25 ballot access decisions of this Court, Hawaii's law is

1 plainly constitutional because viewed as a whole it does
2 not substantially burden Mr. Burdick's ability to cast an
3 effective vote, and if there is any substantial burden,
4 those burdens are justified by Hawaii's compelling
5 interest in narrowing the field of eligible candidates for
6 the general election and promoting an informed vote.

7 And third, to the degree Mr. Burdick is saying
8 that Hawaii need not seat a write-in candidate who would
9 get a certain number of votes, but that nonetheless,
10 Hawaii must count up and publish that speech, this case is
11 not governed by the questions of substantial burdens or
12 the issue of compelling State interests.

13 It is merely controlled by the question
14 established by this Court's public forum cases, namely
15 whether Hawaii has acted neutrally in excluding the purely
16 advisory question from the ballot, I quote, if you don't
17 like all of the people on this list, who would you vote
18 for?

19 That advisory question Hawaii has excluded in a
20 neutral fashion, and because the answer -- that answer to
21 the public forum question runs in our favor, Hawaii's law
22 is constitutional and Mr. Burdick is entitled to no relief
23 from the Federal courts.

24 As the argument in the briefs and the discussion
25 has established, it has to be the case that States have

1 the authority under our Constitution to exclude the
2 ability of voters to cast write-in votes for broad classes
3 of candidates.

4 In fact, Mr. Burdick really doesn't contend
5 otherwise. He says that we need not seat ineligible
6 candidates. We need not seat primary losers, and we need
7 not seat late filers. And if one just looks, for example,
8 at what the right to vote means in our country, it has to
9 mean that. Because in our Nation, and as this Court has
10 defined what voting means in a constitutional sense, the
11 right to vote is preservative of other rights, as this
12 Court said in the Yick Wo v. Hopkins case, because the
13 right to vote is legally effective speech.

14 It is the right, when joined with other votes,
15 to transfer power. Now it is true that not all votes end
16 up in seating a particular candidate, but the reason
17 politicians worry about votes as opposed to just ordinary
18 speech, which is nonetheless very important, is the fact
19 that votes, if there are enough of them, put you out of a
20 job.

21 We have eligibility rules in our Nation for a
22 variety of reasons. We have them because some people, we
23 have determined as a constitutional matter, don't have
24 enough experience. But we also have eligibility rules
25 that would serve to eliminate classes of candidates

1 because they have too much experience, term limits for
2 example.

3 And one of the great ironies of this case, if
4 write-in voting really means the right to vote for
5 whomever one pleases, is that the term limit movement,
6 which is a widespread movement across this Nation, would
7 be shut down at the outset as a matter of constitutional
8 law.

9 And that --

10 QUESTION: Why would that be --

11 QUESTION: I don't understand that, explain that
12 to me.

13 MR. MICHAELS: Well, the petitioner, we think
14 has essentially conceded that Hawaii need not seat anyone
15 who in the 1994 election would vote by write-in for
16 Governor Waihee. His time has come to an end at that
17 time, and for that reason, the term limit is an effective
18 ban that Mr. Burdick agrees Hawaii can effectuate by
19 prohibiting votes for that category of candidates.

20 What he is saying, Hawaii must count up all the
21 protest speech that would be cast at that time for people
22 that want Governor Waihee to keep serving, but we need not
23 seat Governor Waihee for a third term.

24 And what we are contending to the Court is that
25 that protest speech is a public forum question. It is not

1 a voting question because what is being cast by that
2 protest speech is not a vote at all. I hope I answered
3 the question.

4 QUESTION: You haven't at all.

5 QUESTION: You agree, I think you stated
6 expressly in your answer that you understand that they are
7 not claiming that the person for whom the write-in vote is
8 cast must by the same reasoning be seated in office if
9 there is a sufficient number, or would otherwise be a
10 sufficient number of write-in votes to elect the person.

11 You understand them explaining that?

12 MR. MICHAELS: We understand that concession.

13 QUESTION: As long as that concession is made,
14 how does their argument threaten the term limit? In other
15 words, the former governor isn't going to have to go back
16 to the State House on their theory, it is just that
17 everybody is going to know that a lot of people wish he
18 could.

19 MR. MICHAELS: That's true -- well, we do accept
20 the concessions. I suppose my argument was even if they
21 hadn't conceded that, they would have to concede that.

22 QUESTION: Maybe your argument was just
23 hyperbole.

24 MR. MICHAELS: There is probably a little bit of
25 that on both sides, but I accept the criticism.

1 QUESTION: I wasn't worried about the multiterm
2 congressman, I was worried about Donald Duck. That is
3 really scary.

4 (Laughter.)

5 MR. MICHAELS: The point that we would emphasize
6 to the Court also in considering this case is that this is
7 very -- at its outset, a facial challenge to Hawaii's ban
8 on write-in voting. The petitioner, even in the 1986
9 State House race that was before the court, never said who
10 he wanted to vote for, never said whether the person he
11 wanted to vote for was in fact Donald Duck or someone who
12 was not eligible or so on.

13 And under that situation, the Court should not
14 be speculating as to all the possible ranges of situations
15 in which our law might operate in a tough manner. On a
16 facial challenge, you look to see whether there is any
17 circumstance in which the law can be validly applied, and
18 the petitioner has virtually conceded that there are large
19 numbers of cases in which it can.

20 Secondly, the petitioner did not make any record
21 below concerning the burden that our law may impose upon
22 him. There was none of the typical testimony or evidence
23 that one finds in the voting cases that have come up
24 through the courts of appeals, that we really tried to get
25 the signatures but we couldn't; it was too hard to get the

1 signatures at that time of year. None of that -- there is
2 no such testimony in this record.

3 And the record from our side of the case shows
4 that there are large numbers of third parties that exist
5 and have existed in Hawaii and large numbers of
6 nonpartisan candidates who make it through the primary
7 stage.

8 Our Hawaii law is structured around a four-part
9 process; the party petition process which commences with
10 the filing of the party petitions in April; there is the
11 candidate filing deadline in July; there is the primary in
12 September; and then the general election.

13 And Hawaii's law should be particularly amenable
14 to being sustained by this Court because it creates two
15 cumulative opportunities for voters like Mr. Burdick to
16 get the candidates they want on the ballot.

17 We do have a petition route, and you can
18 guarantee access for your chosen candidates by filing the
19 petitions equal to 1 percent of the general electorate
20 vote by April, and we have a primary route.

21 And the routes are structured in a manner so
22 that those persons who try to file for that automatic
23 access in April have that 90-day period between the April
24 deadline and the July candidate filing deadline in which
25 all of the litigation that typically occurs about

1 petitions must occur.

2 The lieutenant governor must make his decision
3 on the petitions within 30 days. There is an
4 administrative appeal authorized under our little APA for
5 the last 60 days; and for those persons who are
6 disqualified from that automatic access by the April
7 deadline, they have the right to bail out and get back
8 into the game by filing for a nonpartisan slot.

9 And what we would emphasize to the Court, also is
10 that you can file a party petition even if you are just a
11 single candidate. This is not the situation that the
12 Court referred to in Storer v. Brown where you have to
13 bring all this party baggage with you to file at the April
14 deadline.

15 QUESTION: Could you explain something to me,
16 General Michaels, just, your primaries are September?

17 MR. MICHAELS: That's right.

18 QUESTION: And your general election is in
19 November, right?

20 MR. MICHAELS: Right.

21 QUESTION: What safety valve is there for the
22 unlikely contingency that on October 1st the two principal
23 candidates are either killed in an airplane accident or
24 suddenly revealed to be armed robbers or some very
25 dramatic thing that would convince 90 percent of the

1 people in Hawaii they didn't want to vote for him. What
2 can be done?

3 MR. MICHAELS: Well, Your Honor raised two
4 hypotheticals and the statute deals with them differently.
5 In the case of death, withdrawal or substitution, the
6 relevant statutes are Hawaii revised statute sections
7 11-117 and 11-118, which appear in our brief.

8 And the way those work for those three
9 categories of postfiling events, there are rules of
10 succession. Within a certain number of days, the
11 candidate can withdraw and the party can actually get a
12 new name on the ballot. It doesn't work for independent
13 candidacies because of the way the independent candidacies
14 are structured, that is it --

15 QUESTION: Let me just change the question a
16 little bit. Assume they don't withdraw. The two
17 candidates that survived, or just some very dramatic
18 incident that makes them extraordinarily unpopular with
19 the electorate, they are revealed to have been involved in
20 something very unusual, is there any safety valve? I
21 mean, you don't have a write-in, so is there any safety
22 valve by which some other candidate could appeal to the
23 electorate?

24 MR. MICHAELS: The law does not allow that, and
25 if I may respond further to explain why, Hawaii's law is

1 set up sort of as a corollary to Abraham Lincoln's famous
2 saying, you can fool all of the people some of the time,
3 and some of the people all of the time. Our theory behind
4 our law is that you are going to fool a lot less of the
5 people all of the time if there is mandatory competition
6 between the candidates.

7 And it is true that there is a gap time at which
8 things can't be changed, and at that point the processes
9 of impeachment and recall are the recourses for the
10 electorate. This is a problem, of course, that we have in
11 between elections generally in this Nation.

12 QUESTION: Of course, that startling disclosure
13 might just as well occur the day after the election as a
14 week before the election and you are still in the same
15 situation. That is a problem that I guess can't be
16 avoided.

17 MR. MICHAELS: It is a problem of republican
18 forms of government, small r.

19 QUESTION: But it is a problem that every State
20 that has write-in ballots has a solution for it up to the
21 election date.

22 MR. MICHAELS: Well, not in 35 States because,
23 or at least in the big block of 27 States that have filing
24 deadlines. In all of those States the legislative
25 judgment has been made that at some point we are going to

1 flush the candidates out, and in fact, if I just might
2 focus on a few of the States that have filing deadlines,
3 some of them do come fairly early in the process.

4 Florida comes 100 days. That is our deadline.
5 Arkansas is 60 days. New Mexico, 56 days; Texas, 55 days.
6 We admit, other States make different judgments about when
7 that filing deadline should occur.

8 QUESTION: Are those filing deadlines, means you
9 can't write-in for the candidate unless he meets that
10 deadline?

11 MR. MICHAELS: That's correct, sir.

12 Our basic, our system is structured in a way so
13 that not only can an individual get on the ballot through
14 the automatic access in April, because you don't have to
15 have party committees, party officers, or rules. The
16 statute admonishes you to file them if you have them, but
17 if you don't have them, you won't be kicked off the
18 ballot.

19 But it also allows the party candidates whose
20 petitions fail to get on the ballot through the
21 nonpartisan process -- there is no disaffiliation
22 requirement under Hawaii law, and so it is truly a case
23 where Hawaii has two complementary and each equally
24 available systems for getting on to the ballot.

25 We submit to the Court that under this Court's

1 cases in Munro v. Socialist Workers' Party is we submit
2 our best case, that our system is wholly constitutional,
3 and there is really no argument by the petitioner that it
4 is not.

5 There are a couple of footnotes in the brief
6 criticizing parts of the law, but there is no extended
7 argument looking into the Court's cases and what the Court
8 has decided in these cases, to challenge as a
9 constitutional matter our law.

10 And if one looks to the principles that the
11 Court adopted in the Munro case, that access at the
12 primary stage alone would be sufficient, we have that
13 automatic backup that you can get into at April with a 1
14 percent signature requirement that is equally sufficient
15 and makes our law doubly good.

16 The Ninth Circuit in this case therefore has a
17 right to say that there wasn't any substantial burden on
18 Mr. Burdick's constitutional interests, and the Court need
19 not get to the second step of the analysis, as to
20 compelling interest, except perhaps to note that there is
21 a rational relationship between the laws, the goals that
22 we have, and the law that is adopted.

23 And we think that that should be the proper way
24 for the Court to decide the case. But even if one gets
25 over that hump, Hawaii's law is backed by compelling State

1 interests at every turn that are narrowly tailored to the
2 way that the law is written.

3 You simply cannot have the kind of informed
4 voting that Hawaii mandates unless you have deadlines that
5 stick, and although Mr. Burdick concedes that the
6 sore-loser interest is only a narrow one, we urge the
7 Court to look at Judge Easterbrook's opinion in the
8 Seventh Circuit case. A lot more people than just the
9 candidates are mad after the primary.

10 Our eligibility requirements, those are conceded
11 to be valid and can be enforced, and at the primary there
12 is an important interest in respecting the party's ability
13 to, in a sense, have their own house in order.

14 Now, Mr. Burdick says that it is enough just to
15 say that in Hawaii our laws provide that you have to be a
16 member of the party in order to be a party candidate at
17 the primary. But time is really of the essence in
18 election law, and the point we wish to make with respect
19 to the party raiding argument is that the parties need not
20 just to have this requirement out there, but they need the
21 time to make that requirement effective by looking at the
22 filing deadline to see if there really is a bona fide
23 person who is a member of their party running in the
24 primary, and then to go to court and to use the time we
25 provide to go to court, if in fact they have a beef about

1 that.

2 And as far as the runaway primary winner
3 argument goes, it is true that in the Federal races and
4 State-wide office, a person isn't automatically seated.
5 But in that instance, as I explained to Justice Stevens,
6 we have provisions for succession in the case of death,
7 withdrawal or substitution, and those rules of succession
8 respect the primary mandate, and the --

9 QUESTION: Mr. Michaels, let me ask you about
10 something you covered, I believe a moment ago, and that is
11 the interest against party raiding and the necessary time
12 for the party to go to court. I don't think I quite
13 followed that. Could you expand on it a little bit?

14 MR. MICHAELS: Our interest at the primary stage
15 in banning write-in voting, in part, not -- we have
16 interests that cover it otherwise, but in part is
17 justified by a party raiding interest. In avoiding the
18 situation where you have a Democrat in sheep's clothing,
19 as it were, running in the Republican primary and then
20 strategic voting by Democrats basically, you get a weak
21 Republican candidate to run against the Democrats. This
22 Court has recognized that as an interest.

23 Hawaii, in our statutes --

24 QUESTION: You could accomplish that, of course,
25 by just providing that only registered voters could vote

1 in the primary of the party, couldn't you?

2 MR. MICHAELS: Only registered Republicans.

3 QUESTION: Yes, only registered Republicans vote
4 in the Republican and only Democrats --

5 MR. MICHAELS: That's true that that is one way,
6 but we have chosen to balance the question a little
7 differently. As a matter of constitutional law in our
8 State, we do have an open primary, and this is recognized
9 because for a large number of races the Democratic primary
10 was determinative, and it remained so in large numbers of
11 races.

12 But for the protection of the Republican Party
13 and the Libertarian Party and any other party that exists
14 in Hawaii, what we do is two things. One, we say that the
15 candidates who run in the primary have got to be party
16 members; and secondly, we provide that 60-day period
17 between the filing deadline and the primary date for the
18 party itself to go to court and say, this person isn't
19 really a Republican or this person is not a Democrat or
20 not a Libertarian or whatever.

21 And under Mr. Burdick's theory of write-in
22 voting at the primary, what he is saying is that you can
23 have last-minute nominations by write-in. If he is really
24 serious about that, that period of time that the State
25 gives to the parties to go to court and effectuate their

1 own interests is gone, and that is why we believe we have
2 a legitimate narrowly tailored party raiding interest.

3 QUESTION: So a registered Democrat could not
4 run in the Republican primary in Hawaii?

5 MR. MICHAELS: That's correct. In large measure
6 this case is not about write-in voting at all, because Mr.
7 Burdick has said that there are broad classes of
8 candidates where he is asking not that a candidate be
9 seated or that politicians need worry about write-in votes
10 in the manner that I described before, but he is asking
11 that Hawaii, at its own expense, count up what he writes
12 on his ballot and publish it in the lieutenant governor's
13 reports.

14 If I could just, at this point, direct the
15 Court's attention to page 71 of the JA, these are sample
16 ballots and this is the way the ballot looks to the voter
17 on election day. These were the facsimile ballots in the
18 1986 election.

19 And we can state to the Court with confidence,
20 it is no crime in Hawaii to write in on your ballot, but
21 we are not going to count it up and we are not going to
22 publish it, and that is the law in Hawaii if you write a
23 message on your ballot.

24 What we are contending under that set of
25 undisputed facts is that this is a case about a claim for

1 State subsidization of protest speech. Actually, it
2 wouldn't matter if Mr. Burdick wrote in and said the
3 lieutenant governor is a great guy. We are not going to
4 publish that either. So whether it is favorable or not
5 favorable, we just don't publish what is written in on the
6 ballot if it is not punched and executed in a manner
7 required by law.

8 And under the Court's decisions, the Cornelius
9 case is certainly a very powerful case for us. This is a
10 matter that the State can regulate, how it publishes
11 the -- and what questions it will address at the ballot.

12 Judge Posner in the Georges v. Carney case put
13 it very well, a State could decide to have the advisory
14 question of who if not these do you want regardless of
15 whether they could be seated, but Hawaii, along with a
16 large number of States has decided not to do that, and
17 that is a legitimate decision to make.

18 I might just add that in that regard, our law
19 would also be justified as a time, place and manner
20 restriction at the ballot because what you are saying, if
21 there is this right to cast this advisory speech, is that
22 you must double the election ballot, that there is an
23 advisory question tacked on to every single race from
24 governor on down, and that conceptual overcrowding of the
25 ballot is something that Hawaii has an interest in

1 avoiding.

2 And unless the Court has further questions, we
3 rest on the briefs, and we ask the Court to affirm the
4 judgment of the Ninth Circuit.

5 QUESTION: Very well, Mr. Michaels.

6 Mr. Eisenberg, you have 6 minutes remaining.

7 REBUTTAL ARGUMENT OF ARTHUR N. EISENBERG

8 ON BEHALF OF THE PETITIONER

9 MR. EISENBERG: Thank you, Your Honor.

10 In response to Justice Scalia's expressed
11 concern about Donald Duck, the State may have some
12 dignitary interest in not recording in its books the vote
13 for Donald Duck, but it is our position that that vote
14 should, at the very least be recorded as a vote no.

15 And a vote no is not the same as a blank vote
16 because the blank vote does not necessarily signify that
17 the person is voting against the specific candidate, in
18 this instance, who is running on the ballot.

19 In talking about --

20 QUESTION: I am troubled that the case might
21 turn on that. Do you think the case might -- if we
22 disagree with that proposition, do you lose the case?

23 MR. EISENBERG: The proposition that --

24 QUESTION: That a no vote is qualitatively much
25 different than a blank ballot?

1 MR. EISENBERG: We think Hawaii's deficiencies
2 are twofold, Your Honor. I think the answer to your
3 question is we don't lose the case because Hawaii's law is
4 deficient in a second way.

5 Hawaii essentially closes off, as we said, the
6 political process to write-in vote, and even for qualified
7 votes, so that if somebody wants to vote for -- not
8 express a no vote, a protest vote, but vote by virtue of a
9 write-in for somebody who is perfectly qualified to hold
10 office, we think Hawaii's law which closes off the process
11 60 days before the primary election and 105 days before
12 the general election is deficient on that ground as well.

13 The total prohibition simply cannot be
14 sustained. On that issue, there was some discussion with
15 Mr. Michaels about filing deadlines with respect to those
16 States that require a write-in candidate to register
17 shortly before the election, and Mr. Michaels shows
18 several States which have quite long filing deadlines.

19 There are other States that we could have chosen
20 that have quite short filing deadlines; California
21 requires filing by write-ins 2 weeks in advance of the
22 election.

23 QUESTION: But under your argument all the
24 States with a long filing deadline for write-in candidates
25 would also be violating the Constitution.

1 MR. EISENBERG: We think that those States are
2 subject to the Anderson against Celebrezze requirement,
3 but the fact is that most States have filing deadlines a
4 week or two shortly before the election. In Arizona it is
5 the Wednesday before. In Illinois it is the Friday before
6 the election.

7 QUESTION: You say even those are invalid.

8 MR. EISENBERG: No, no, we do not say that those
9 are invalid. We think that those restrictions shortly
10 before an election, the filing deadline is reasonable, and
11 the State can say if the write-in candidate does not file,
12 that write-in candidate is not eligible to hold office.
13 If the deadline is not unreasonably long, we say that
14 those filing deadlines are perfectly reasonable.

15 The only then remaining question is, what does
16 the State do with a vote for somebody who has not
17 registered? What does the State then do with the vote for
18 an unqualified voter? In that circumstance, the vote in
19 our view is a protest vote, is a vote no, and in that
20 circumstance, the State must still record the vote as a
21 vote no, but we have no problem with filing deadlines for
22 write-in candidates that are reasonably imposed.

23 QUESTION: Well, you do. You say that even
24 those votes for candidates who haven't met the filing
25 deadlines have to be counted.

1 MR. EISENBERG: Have to be counted as a no vote;
2 that is different, we think, than a vote for a qualified
3 candidate. Our view is that if an individual votes for a
4 qualified candidate, that must be counted in a quite
5 serious way to effect legal change.

6 QUESTION: These States that have 1- or 2-week
7 filing deadlines, do they now count those votes no for
8 people who haven't --

9 MR. EISENBERG: Some States do and some States
10 don't. I think as we have surveyed the statutory
11 framework, most States say the candidate who fails to file
12 properly, shortly before an election, is ineligible to
13 hold office and the vote won't be counted. But there are
14 some States, for example, Georgia, that has a filing
15 deadline that continues to count the votes, and in fact,
16 there was an unreported Federal district court decision in
17 the 1980s, James against Falagant, where the voters voted
18 into office, in essence, an individual who did not
19 properly register.

20 And the question in that circumstance was
21 whether Hawaii's prohibition against that individual from
22 serving had to be recognized, or whether, when the voters
23 vote in somebody who hadn't complied with the filing
24 requirements and therefore was ineligible, whether that
25 person had nonetheless to be seated, and the Federal

1 district court concluded that the ineligibility would
2 stand and that the individual wouldn't be seated, but the
3 vote is recognized as a protest vote.

4 QUESTION: You didn't disagree with that?

5 MR. EISENBERG: No, that in fact is the
6 appropriate approach we think.

7 What is at stake in this case is the right of
8 the voters to choose, petitioner's right to direct his
9 portion of sovereign power to the candidate of his choice.
10 This right, we say, is not an absolute right. Many States
11 regulate write-in voting in a variety of ways, with
12 specific focused concerns, and those regulatory measures
13 at not at issue in this case.

14 What is at issue is the application of Hawaii's
15 total prohibition against all write-in voting in all
16 elections and under all circumstances. That total
17 prohibition, we think, cannot satisfy the standard
18 articulated by this Court in Anderson against Celebrezze.
19 That total prohibition cannot be shown necessary to the
20 advancement of any substantial governmental interest, and
21 the decision of the court of appeals should be reversed.

22 Thank you.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
24 Eisenberg, the case is submitted.

25 (Whereupon, at 11:05 a.m., the case in the

1 above-entitled matter was submitted.)
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CERTIFICATION

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

NO. 91-535 - ALAN B. BURDICK, Petitioner V. MORRIS TAKUSHI,
DIRECTOR OF ELECTIONS OF HAWAII, ET AL.

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

BY Ann-Marie Federico

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