

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

ORIGINAL

CAPTION: MURPHY J. FOSTER, JR., GOVERNOR OF
LOUISIANA, ET AL., Petitioners v. G. SCOTT LOVE,
PAUL S. BERGERON, KATHLEEN B. BALHOFF AND
BENNIE BAKER-BOURGEOIS

CASE NO: 96-670, et al.

PLACE: Washington, D.C.

DATE: Monday, October 6, 1997

PAGES: 1-49

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY

OCT 14 1997

Supreme Court U.S.

ORIGINAL

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'97 OCT 14 P3:37

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

MURPHY J. FOSTER, JR., :

GOVERNOR OF LOUISIANA, ET :

AL., :

Petitioners :

v. : No. 96-670

G. SCOTT LOVE, PAUL S. :

BERGERON, KATHLEEN B. BALHOFF :

AND BENNIE BAKER-BOURGEOIS :

- - - - -X

Washington, D.C.

Monday, October 6, 1997

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:08 a.m.

APPEARANCES:

RICHARD P. IEYOUB ESQ., Attorney General of Louisiana,
Baton Rouge, Louisiana; on behalf of the Petitioners.
M. MILLER BAKER, ESQ., Washington, D.C.; on behalf of the
Respondents.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
RICHARD P. IEYOUB, ESQ.	
On behalf of the Petitioners	3
ORAL ARGUMENT OF	
M. MILLER BAKER, ESQ.	
On behalf of the Respondents	27

1 PROCEEDINGS

2 (11:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-670, Murphy Foster v. Scott Love.

5 Spectators are admonished not to talk until you
6 get out of the courtroom. The Court remains in session.

7 General Ieyoub.

8 ORAL ARGUMENT OF RICHARD P. IEYOUB

9 ON BEHALF OF THE PETITIONERS

10 GENERAL IEYOUB: Mr. Chief Justice and may it
11 please the Court:

12 This is the Federal Election Day case up from
13 Louisiana. As Your Honors know, the 42nd Reconstruction
14 Congress put the Federal Election Day statute on the books
15 in 1872. The question presented is whether the Federal
16 Election Day statute nullifies Louisiana's open primary
17 system under which all registered voters, regardless of
18 party affiliation, vote for their candidates for Senate
19 and United States Representative.

20 Under Louisiana law as we know it since 1976, if
21 a candidate receives a majority of the votes in the
22 October primary the candidate is declared elected, and
23 there's no contested election on Federal Election Day,
24 shall we say saving the poor working man a trip to the
25 polls in nonpresidential election years.

1 QUESTION: General Ieyoub, does any other State,
2 to your knowledge, have this system?

3 GENERAL IEYOUB: Yes, Your Honor. Oklahoma has
4 a similar system, as does Hawaii, Your Honor.

5 QUESTION: And they each provide, as Louisiana
6 does, for an open primary and no general election if a
7 candidate gets a majority?

8 GENERAL IEYOUB: Yes, Your Honor.

9 QUESTION: Now, California has a system, I
10 believe, of allowing crossover voting in primary
11 elections, is that right?

12 GENERAL IEYOUB: I'm not sure, Your Honor. I
13 believe that's correct.

14 QUESTION: And some States allow crossover
15 voting. In other words, there's a primary election to
16 pick the party's candidate, but parties -- people who
17 belong to another political party may cross over and
18 vote --

19 GENERAL IEYOUB: Yes, Your Honor.

20 QUESTION: -- in the party primary.

21 GENERAL IEYOUB: Yes, Your Honor.

22 QUESTION: But in effect Louisiana and you say
23 several other States don't treat the primary election as a
24 party primary.

25 GENERAL IEYOUB: No, Your Honor, it does not.

1 Everyone has a right to vote in the open primary in
2 October, regardless of party affiliation.

3 QUESTION: Mm-hmm.

4 GENERAL IEYOUB: And all candidates run in the
5 primary regardless of the party affiliation, so that if
6 there is not a majority vote, then the two top vote-
7 getters go into --

8 QUESTION: And why is it that Louisiana made
9 that change? I guess it was not always that way. It
10 wasn't until the late seventies.

11 GENERAL IEYOUB: That's correct, Your Honor. I
12 do not know why they made that change, Your Honor, but the
13 change was made in 1976, and it actually went into effect
14 in 1978, and since 1978, Your Honor, we have proceeded
15 under the open primary law manner of election.

16 QUESTION: Well, you -- do you concede that
17 Congress has the power under the Constitution to enact
18 laws affecting the timing of election of Members of the
19 Congress?

20 GENERAL IEYOUB: Yes, Your Honor. Congress may
21 at any time alter regulations as it see fits, but I would
22 point out that in 20 years, almost 20 years of the open
23 primary, Congress has never moved to try to alter
24 Louisiana's manner of electing its representatives to
25 Congress so as to force a determinative election on

1 Federal Election Day, and Your Honors, the --

2 QUESTION: Well, I guess the question, really,
3 is whether the statutes that Congress did pass are
4 contrary to Louisiana's scheme, as was held in the court
5 below.

6 GENERAL IEYOUB: No, Your Honor, I would argue
7 that it is not. At the time the statute was passed by
8 Congressman Butler and Senator Thurman in 1872, primaries
9 were unknown. They did not foresee primaries. Primaries
10 were a creature of the 20th Century, as fully stated in
11 this Court's decision in United States v. Classic, but
12 they did have the foresight to make exceptions for death
13 or failure to elect, in which case they allowed elections
14 other than on Federal Election Day.

15 QUESTION: Well, do you say that Louisiana's
16 system creates a vacancy, so the vacancy statute applies?

17 GENERAL IEYOUB: Louisiana's system certainly
18 allows for the election of a candidate in October, as
19 opposed to actually electing on Federal Election Day.

20 QUESTION: Well, except the Federal statute
21 fixes the Tuesday next after the first Monday in November
22 as the day for election for the Members of Congress.

23 GENERAL IEYOUB: That's correct, Your Honor, and
24 Louisiana's statutory scheme does, in fact, set a date on
25 the first Tuesday after the first Monday. It does do

1 that. We simply --

2 QUESTION: But the election, if there's a
3 majority vote in the primary, does not occur on that date.

4 GENERAL IEYOUB: Well, that's correct, Your
5 Honor, and I submit that what we have here is an old
6 statute and new circumstances, in which case I think that
7 we have to look to the legislative purpose and the
8 legislative history, as Chief Justice Taney said, looking,
9 if necessary, to the public history of the times in which
10 the statute was passed, and Justice Holmes saying you can
11 look to the respective minds of Congress.

12 QUESTION: So you accept the proposition that
13 Louisiana law de jure authorizes elections before the
14 Federal election date?

15 GENERAL IEYOUB: That is correct, Your Honor, a
16 person can be elected de jure under Louisiana's scheme,
17 but what we're saying here is that Thurman and Butler
18 wanted to protect the right to choose, and that is
19 protected by Louisiana's statutory scheme.

20 What was important, what is important is, as
21 Hamilton said, the right of the people to choose those
22 whom they -- who will govern them, and we allow that.
23 Louisiana's statutory scheme allows that. That was what
24 was --

25 QUESTION: But the question is when it's

1 allowed, and I know that it's called an open primary, but
2 would you explain to me why that isn't a misnomer?

3 As you've said, everyone can vote. That's the
4 time everyone votes. It's not like a party primary, and
5 in order to be in the running you must participate.

6 Now, why aren't those two features, when they're
7 combined -- everyone votes. Everyone who wants to run
8 must be in on this inning. Why doesn't that add up to an
9 election?

10 GENERAL IEYOUB: Well, Your Honor, there is an
11 election on October -- in October.

12 QUESTION: So then that is the Election Day.

13 GENERAL IEYOUB: That is the election primary
14 date, Your Honor, and if a person receives a majority of
15 the vote, and only in that instance, they are declared
16 elected, and there would be no determinative election on
17 Federal Election Day.

18 QUESTION: Yes, but my question to you is, why
19 don't we just call it what it is, that is, an election,
20 since everybody votes, and everybody who wants to be in
21 the running is there? Why isn't -- why is it labeled
22 primary? It is an election, and it seems to me, being an
23 election it conflicts with the Federal single Election
24 Day.

25 GENERAL IEYOUB: Well, Your Honor, it is an

1 election. It is also a system of voting that winnows down
2 the candidates in many cases, where you have two
3 individuals with the highest vote totals going into a
4 general election on Federal Election Day, but --

5 QUESTION: But you could do that consistent with
6 the Federal day by having, if there are two people, then
7 you have a run-off, as can happen in some States.

8 GENERAL IEYOUB: That's correct, Your Honor.

9 QUESTION: Later on, before January.

10 GENERAL IEYOUB: That's correct, and that is
11 possible, but the State legislature of Louisiana, which we
12 contend has the primary authority to set the manner of
13 elections, has acted in such a way as to hold this scheme,
14 the open primary scheme, as the law of our State.

15 If we look at the hist --

16 QUESTION: But what interest of Louisiana would
17 be affected if Louisiana said, we're going to do our same
18 thing, except we're going to do it on Federal Election Day
19 and, if need be, in the 20 percent of the cases, we'll
20 have a run-off. Then you would be acting consistently
21 with all of the State goals, and with the Federal law.

22 GENERAL IEYOUB: Louisiana could do that, Your
23 Honor, but what we're saying here is that Louisiana's open
24 primary scheme in no way really clashes or conflicts with
25 the Federal Election Day statute.

1 QUESTION: Well, it does conflict, because it
2 has an election on a day other than the day specified by
3 the Federal statute. That's why we're here. Isn't that a
4 clear conflict?

5 GENERAL IEYOUB: No, Your Honor, because I
6 believe that you can't necessarily give a literal
7 interpretation in this particular --

8 QUESTION: Why not?

9 GENERAL IEYOUB: Well --

10 QUESTION: The statute's clear.

11 GENERAL IEYOUB: -- simply because I think that
12 it might -- it would lead to unreasonable --

13 QUESTION: What's unreasonable about it?
14 Congress has decided that it wants the election to occur
15 uniformly on a given day in November throughout the United
16 States. What's unreasonable about --

17 GENERAL IEYOUB: We have that, Your Honor. We
18 have that --

19 QUESTION: No, you don't have that. Your
20 election, if there is a majority, occurs in October, not
21 in November.

22 GENERAL IEYOUB: Well, Your Honor, we submit
23 that under the sovereignty of the State we have a right at
24 least to set the manner in which our representatives to
25 Congress will be elected, and it does not conflict in the

1 sense that it's closely --

2 QUESTION: There is no constitutional authority
3 on the part of Congress to determine the time, uniformly
4 throughout the country?

5 GENERAL IEYOUB: There is, Your Honor, but as
6 was pointed out by Mr. Madison in his answer to Mr.
7 Monroe's question about the Times, Places, and Manner
8 Clause, the States should have the primary responsibility.
9 The reason why the Federal Government might have some
10 control is that they were afraid that if the Federal -- I
11 mean, if the State legislatures did not act appropriately,
12 it could bring about the dissolution of the Union, and
13 that's what --

14 QUESTION: Is it us -- is it up to this Court to
15 decide whether Louisiana has acted appropriately in
16 determining whether a pretty clear Federal statute is
17 going to be applied or not? Is that what you're asking us
18 to do?

19 GENERAL IEYOUB: No, Your Honor. I am -- I
20 think that Congress has a right to decide whether or not
21 there is a determinative election on Federal Election Day.
22 Under Article I, section 5, also --

23 QUESTION: Do you think that this is a
24 justiciable controversy?

25 GENERAL IEYOUB: No, Your Honor, I do not think

1 it's a justiciable controversy, because I fail to see the
2 injury that the respondents have really suffered.

3 They had a right to vote. They had the right to
4 vote in October. Now --

5 QUESTION: So that --

6 QUESTION: But I want to make sure I understand
7 your position. Your position, then, is not really an
8 argument about whether the statute applies, and if so,
9 how, and whether there is an inconsistency between it and
10 the Louisiana statute. Your position is that this issue
11 really does not belong in the court.

12 GENERAL IEYOUB: Yes, Your Honor, that is my
13 position. It does not belong in the court.

14 The right of an individual to vote in any manner
15 is not absolute, and this Court so stated in *Burdick v.*
16 *DeCoushy*, that the manner of voting is not necessarily an
17 absolute right.

18 Now, if Your Honors would look at the appendix,
19 joint appendix on page 43, one of the respondents says, I
20 did not vote in the October open primary in which Billy
21 Tauzin received a majority of the vote and was thereby
22 elected outright under Louisiana law. I was, therefore,
23 prevented by the Louisiana law from exercising my right
24 under the Constitution and Federal law to vote in an
25 election.

1 She did not vote in the primary, and now she's
2 saying that since I did not vote in the manner in which
3 Louisiana prescribed, I have been deprived, and I have
4 been injured, and Your Honor, we say that will not do.
5 That is just not correct, and the matter should not be in
6 this Court.

7 QUESTION: Then your view is that no voter, as
8 long as they could vote in something they called a
9 primary, would have standing to object to Louisiana's
10 deviating from most of the country in having what is the
11 election a month before everyone else does.

12 GENERAL IEYOUB: Well, Your Honor, I would say
13 that certainly there would -- in our situation, where
14 there is an open primary and an October election, when one
15 fails to vote they have not really suffered an injury to
16 the extent that this Court, or to the extent it would
17 create a justiciable controversy in which this Court --

18 QUESTION: If you -- General Ieyoub, that's how
19 you -- if you fail to vote you have no standing, and if
20 you vote you haven't been injured, I suppose, so the
21 result would be that no individual voter could ever
22 challenge the violation, or claim violation of the
23 congressional statute.

24 GENERAL IEYOUB: Your Honor, when it comes to
25 the manner of voting, I think that's correct, when it

1 comes to a State being able to set forth the manner of
2 voting, as Louisiana has done in the open primary.

3 QUESTION: Yes, but of course, you can have
4 someone who became 21, or whatever your voting age is, on
5 November 1, couldn't have voted in October, but had the
6 Federal statutory right to vote in November but you say,
7 well, that's tough luck.

8 GENERAL IEYOUB: Your Honor, they do have a
9 statutory right to vote in November.

10 QUESTION: But there's no election in November
11 under your system.

12 GENERAL IEYOUB: At times there are, Your Honor.
13 At times there are -- there is the opportunity to vote in
14 November.

15 QUESTION: Indeed, most of the time it's
16 resolved in the primary, as I understand it.

17 GENERAL IEYOUB: The history has been, Your
18 Honor, that in the past most of the time they have been
19 elected during the primary, and I will point out that
20 under Article I, section 5, the Congress has the authority
21 to challenge the seating of any individual elected to
22 Congress and after 20 years Congress has never moved to
23 remove the credentials of any Louisiana Senator or
24 Congressman because they were elected in October as
25 opposed to November.

1 I think the results would be unreasonable and
2 impractical to say that if a Congressman got over 50
3 percent of the vote in a primary, they're not qualified to
4 serve in Congress. The fact that they would get 50
5 percent of the vote is an indication of the favor that the
6 people hold him in, and to say that just because it was in
7 October as opposed to an election day in November, that
8 they do not have a right to serve after the people have
9 chosen, I think would lead to unreasonable --

10 QUESTION: Under that argument you could maybe
11 have your primary in September and then if you need a run-
12 off have that in October. It would still be all right
13 under your analysis.

14 GENERAL IEYOUB: That's correct, Your Honor.

15 QUESTION: You don't -- they could -- you could
16 just ignore the November date.

17 GENERAL IEYOUB: Well, we could, but we did not,
18 Your Honor.

19 QUESTION: You didn't. I understand that.

20 GENERAL IEYOUB: We did not, and in fact --

21 QUESTION: But as a matter of law, if we're
22 trying to figure out what the law requires, you could.
23 The law really is a nullity as far as it requiring any
24 particular date for the congressional election in
25 Louisiana.

1 GENERAL IEYOUB: Well, Your Honor, I submit that
2 the --

3 QUESTION: Maybe it isn't necessary, and maybe
4 it doesn't make any sense, but under your view it seems to
5 me it really just isn't even on the statute books.

6 GENERAL IEYOUB: Well, I think that Louisiana's
7 scheme really does not in any way offer an abuse to its
8 constitutional authority to set the manner, the primary
9 authority to set the manner of elections. We have a
10 primary, or an election, in October closely tethered or
11 closely associated with the Federal Election Day in
12 November.

13 QUESTION: Yes, but you don't have to, if the
14 statute means what you says it does. Maybe you do out of
15 your -- you know, the goodness of your heart to try and
16 cooperate with what Congress would like you to do, but you
17 don't have to under your reading of the statute.

18 GENERAL IEYOUB: Under our reading of the
19 statute, Your Honor, you're correct. If we have a
20 majority vote-getter in October, then we feel that it's a
21 useless exercise and a useless expense of money and time
22 to have another election and, by the way, that was one of
23 the objectives of passing the Federal Election Day.
24 Butler and Thurman didn't want multiple Federal elections
25 so that the poor working man would have to take multiple

1 trips to the polls, and that's --

2 QUESTION: General Ieyoub, you are making an
3 argument here today, at least in part, that the voters
4 don't have standing and this is not a justiciable
5 controversy. That was not included in the question, was
6 it, that you brought forward on certiorari?

7 GENERAL IEYOUB: Your Honor, we have in our
8 brief --

9 QUESTION: As I read the question presented, you
10 said the specific question presented is whether the
11 election system employed by the State of Louisiana to
12 elect its Members to Congress conflicts with Federal laws
13 governing the time for holding congressional elections.

14 GENERAL IEYOUB: That's right, Your Honor.

15 QUESTION: And I thought that was the question
16 we were going to decide.

17 GENERAL IEYOUB: That -- that --

18 QUESTION: Although you seem to be arguing
19 something different today.

20 GENERAL IEYOUB: Your Honor, we raised subject
21 matter jurisdiction in our brief.

22 QUESTION: Not in the question presented,
23 however.

24 GENERAL IEYOUB: No, Your Honor. No, we did
25 not.

1 QUESTION: No.

2 GENERAL IEYOUB: Your Honor, we have a very --

3 QUESTION: Did you raise it in your brief? I
4 confess not even to have seen it in -- I mean, I'm
5 perfectly willing to consider it, even if you didn't raise
6 it. Gee, I think -- I think I ought to consider it, but I
7 didn't even see it in your --

8 GENERAL IEYOUB: Your Honor, it's either in the
9 appendix, the joint appendix, or in the brief. I think
10 it's -- it may be in the joint appendix where we raise
11 subject matter jurisdiction, and in any event I --

12 QUESTION: The joint appendix?

13 QUESTION: Why would it be in the appendix?

14 GENERAL IEYOUB: It's certain particular motions
15 that we had filed.

16 QUESTION: Not in this Court.

17 GENERAL IEYOUB: No. No.

18 QUESTION: This is all new stuff to me. I mean,
19 I -- you know.

20 GENERAL IEYOUB: But Your Honor, I would submit
21 that this Court alone can raise the --

22 QUESTION: Well now, just a minute. You said
23 you had raised it in your brief. Where in your brief?

24 GENERAL IEYOUB: I apologize, Mr. Chief Justice.
25 We did not raise it in our brief. I was thinking of page

1 24 of the joint appendix, where, in the United States
2 District Court for the Middle District of Louisiana we
3 raised that the court lacked subject matter jurisdiction
4 in our answer, in that, so I apologize, Mr. Chief Justice.

5 QUESTION: It would have been nice to say
6 something in your brief if you were going to make a big
7 deal about it in your oral argument --

8 GENERAL IEYOUB: Well, Your Honor, I made a big
9 deal about it in response to a question by Justice Souter,
10 and I think it's a big deal when you really come down to
11 it.

12 I think that -- in Ex parte Siebold this Court
13 construed Article 1, section 4 not as any Federal
14 juggernaut just totally wiping out regulation, or the
15 manner of regulations that were passed by the State, but
16 what they asked for, what this Court said was that we need
17 cooperation between the Federal sovereignty and the State
18 sovereignty, a harmonizing combination into one system of
19 regulations made by the two sovereignties. That's what we
20 have here in Louisiana.

21 The open primary system, it doesn't really clash
22 or conflict. What it does is, it harmonizes two
23 sovereignties, putting together election regulations.

24 QUESTION: But you conceded that you could
25 harmonize also if you just shifted the day that you have

1 this election from October till November. Then you would
2 be totally on track with the Federal statute. You would
3 serve the State purpose. I don't understand why the
4 harmonizing doesn't work against you, because it seems so
5 easy for Louisiana to comply.

6 GENERAL IEYOUB: Your Honor, that is within the
7 purview of the State legislature to do exactly what you
8 say. They chose not to do it in the last legislative
9 session, although they were faced with that issue.

10 We argue, however, that the history of the
11 adoption of Article I, section 4, title 2, section 7 and
12 its adoption, indicates that at the time it was passed, at
13 the time the -- first of all, it indicates that the State
14 has the primary authority to regulate the manner of
15 elections.

16 Second, it indicates that they didn't foresee
17 primaries, and that primaries have been seen by this Court
18 as an integral part of the electoral process, and that
19 what the statute fathers of -- in 1872 were trying to do
20 was to ensure the right to choose, and the people of
21 Louisiana have a right to choose their representatives
22 that go to Congress.

23 QUESTION: Is it not a fact that at least in
24 presidential election years the percentage of voter
25 turnout at the primary is only around 30 percent or so,

1 whereas the percentage of turnout at the November election
2 is in the fifties and sixties percent?

3 GENERAL IEYOUB: That's correct, Your Honor.

4 QUESTION: So it does make a -- perhaps make a
5 difference to the outcome of the election if you have a
6 very low turnout in one time and a very high turnout in
7 the other.

8 GENERAL IEYOUB: Well, that's correct, Your
9 Honor, but I submit that Louisiana has had very high voter
10 turnout in the October primary and

11 QUESTION: Well, in 1980 it was 28 percent, I
12 think, in 1984, 31 percent, and at the General Election
13 was over 50 percent.

14 GENERAL IEYOUB: Well, that's correct, Your
15 Honor, but we still say that we have a very close
16 relationship with the Federal Election Day, not such that
17 it's an abuse of our constitutional authority simply to
18 have a system whereby the person that gets the majority of
19 the vote is elected, and there's no need for another
20 useless election on October, on November 2, or whenever.

21 QUESTION: General Ieyoub --

22 GENERAL IEYOUB: Yes, Your Honor.

23 QUESTION: -- what is the State's position, if
24 it has one, on the suggestion of Justice Dennis, or Judge
25 Dennis, who I believe dissented in the court below, that

1 if this is such a problem the Federal court could simply
2 enjoin a declaration that the candidate was elected? You
3 can't do that any more, but you could still conduct a
4 primary.

5 GENERAL IEYOUB: That's correct, Your Honor.
6 The State's --

7 QUESTION: That's correct, I know, what Judge
8 Dennis said. What's the State's reaction to it?

9 GENERAL IEYOUB: The State's reaction is that
10 that can be done, and the State's reaction would be that
11 that -- we could absolutely do that. We could have the
12 October primary and just simply not say, well, they're not
13 declared elected, but that they would be declared elected
14 as of the Federal Election Day. The State would do that,
15 Your Honor.

16 QUESTION: But would they do that with or
17 without putting their names on the ballot in the November
18 election?

19 GENERAL IEYOUB: They --

20 QUESTION: It doesn't seem to me it's much of a
21 change if you simply make your declaration later but don't
22 let anybody vote after the October date.

23 GENERAL IEYOUB: We could certainly put the
24 names of the candidates on the ballot, though.

25 QUESTION: And give them --

1 QUESTION: And what happens if the other one
2 wins?

3 GENERAL IEYOUB: I'm sorry, Your Honor.

4 QUESTION: Suppose A gets a majority of the
5 votes in the primary, and then we put their names on the
6 ballot again in November, but more people turn out, and
7 this time B wins. Who's elected?

8 QUESTION: Or there's a big scandal in between,
9 and who came in second now comes in first.

10 QUESTION: Right.

11 GENERAL IEYOUB: Well, Your Honor I --

12 QUESTION: You've got -- you're --

13 QUESTION: You'd only put one name on the
14 November ballot.

15 GENERAL IEYOUB: That's exactly --

16 QUESTION: Isn't that the answer? You'd only
17 put one name on.

18 GENERAL IEYOUB: That's exactly right, Your
19 Honor.

20 QUESTION: So it would be an election with --

21 GENERAL IEYOUB: That's right, and that's
22 basically what happened in --

23 QUESTION: Yes or no, I guess.

24 GENERAL IEYOUB: That's exactly right, Your
25 Honor. We would put one name on the --

1 QUESTION: Is there a write-in procedure in your
2 State?

3 GENERAL IEYOUB: No, Your Honor, there is not.
4 There's not a write-in procedure. But my time is --

5 QUESTION: Well, what about conforming by
6 putting the two top names, so you have your open primary,
7 as you call it, in October, and then in November, number 1
8 and number 2 get on the ballot. You could do that, too.
9 You just --

10 GENERAL IEYOUB: That --

11 QUESTION: You put the second -- the one who
12 took second place on even --

13 GENERAL IEYOUB: Even if they don't --

14 QUESTION: Right.

15 GENERAL IEYOUB: Even if there's a majority?

16 QUESTION: Right. That would be compliance,
17 too, I guess.

18 GENERAL IEYOUB: Yes, Your Honor, that would be
19 compliance.

20 QUESTION: Do you want a Federal court to pick
21 which one of these things will be compliance and enjoin --

22 GENERAL IEYOUB: No. No, Your Honor.

23 QUESTION: Well then, you don't agree with the
24 dissenting judge below. Why should we figure out how you
25 should come into compliance?

1 GENERAL IEYOUB: Well, Your Honor, I'd --

2 QUESTION: You know, what your State legislature
3 considers severable from the rest of the scheme.

4 GENERAL IEYOUB: I suggest that you shouldn't,
5 that it's really Congress. If Congress wishes to do that,
6 it may do that at any time.

7 QUESTION: I don't think Judge Dennis' position
8 was that he would leave it to the State to decide. He --
9 I understood him to say that you could accept all of your
10 opponent's arguments and still solve the constitutional
11 problem by simply declaring unconstitutional that part of
12 the Louisiana statute which declared the person at the
13 October primary who won to be elected, and just say that
14 wasn't so, that there would be only one name on the ballot
15 in November, but the person wouldn't be actually elected
16 until then because you would strike out the declaration.

17 GENERAL IEYOUB: Mr. Chief Justice, that's
18 exactly right. That's what Justice Dennis said, but prior
19 to the time he said that, he disagreed with the holding of
20 the other two judges that it was in any way a conflict, or
21 that our system was in any way in conflict with the
22 Federal Election Day statute, and we certainly hold to
23 that particular position, that the State has the primary
24 authority from the Court's earliest reading of Article I,
25 section 4, that the State has the primary authority to set

1 the manner of elections.

2 QUESTION: May I ask if it also means you would
3 take the position that they could say whoever has the most
4 votes in the primary shall be the only candidate whose
5 name appears on the November ballot? Could you do that?

6 GENERAL IEYOUB: Under our present --

7 QUESTION: No, it's not under -- but as a matter
8 of -- consistent with your legal position as a matter of
9 constitutional Federal law and all the rest of it. Could
10 Louisiana enact a statute that said the person who has the
11 highest votes in the primary is the only person whose name
12 may appear on the November ballot.

13 GENERAL IEYOUB: I think that it could do that,
14 Your Honor.

15 And now my time is short, so I'll try to
16 conclude. We say that the unfounded fears of the Fifth
17 Circuit majority are contrary to this Court's earliest
18 reading of Article I, section 4, and to this Court's
19 harmonizing manner of interpreting Federal statutes and
20 companion State election regulations. I mean, of course,
21 as in Ex parte Siebold.

22 Of course regulations made by Congress are
23 paramount and supersede those of the State, but only --
24 and here I quote one of this Court's great judges, Justice
25 Bradley -- but only insofar as the two are inconsistent

1 and no farther.

2 We say there is no conflict, no clash between
3 the Federal Election Day and Louisiana's primary law. As
4 Justice Bradley said so well in Siebold, let a spirit of
5 national as well as local patriotism prevail. Let
6 unfounded jealousies cease, and we shall hear no more of
7 the impossibility of harmonious action between the
8 national and State governments on a matter on which they
9 have a mutual and vital interest.

10 If the Court please Your Honors, the judgment
11 below must be reversed.

12 QUESTION: Thank you, General Ieyoub.

13 Mr. Baker, we'll hear from you.

14 ORAL ARGUMENT OF M. MILLER BAKER

15 ON BEHALF OF THE RESPONDENTS

16 MR. BAKER: Mr. Chief Justice Rehnquist, and may
17 it please the Court:

18 The key issue in this case, Your Honors, is that
19 this is not an attack on Louisiana's prerogative to
20 maintain this type of election system. Justice Ginsburg
21 got it exactly right. Louisiana can maintain what it has,
22 but it has to conform it to the requirements of Federal
23 law, and that would mean this primary, which is really an
24 election, on Federal Election Day, with a run-off
25 thereafter as required by section 8.

1 QUESTION: There's about 20 percent of the cases
2 where a runoff is held now.

3 MR. BAKER: That's correct, Justice Kennedy.

4 QUESTION: So under your proposal on -- and I
5 take it those are the closest elections, so under your
6 proposal the closest elections are the one where there's
7 the lowest turnout.

8 MR. BAKER: I'm not sure I understand the
9 question, Justice Kennedy.

10 QUESTION: Well, if the close elections are
11 this, this 20-percent category, under the corrective
12 remedy that you've just proposed the closest elections are
13 going to be decided by the ones with the lowest turnout.

14 MR. BAKER: That's correct.

15 QUESTION: Is that the only corrective, or
16 could -- would it suffice in your view if Louisiana simply
17 certified the successful candidate on the Federal Election
18 date? He had to be alive, and then he's to get
19 certified?

20 MR. BAKER: Well, it -- Justice Kennedy, with
21 respect to the former, the hypothetical you gave me, the
22 Federal statute requires that any runoff election be held
23 at some point after the --

24 QUESTION: I understand that.

25 MR. BAKER: And the fact that turnout may be

1 lower is inconsequential to the Federal statutory scheme.
2 That's just a fact of life, and that -- we saw that in
3 Georgia in 1992, where Georgia had an election for the
4 United States Senate in which no candidate obtained a
5 majority of the vote in November and there was a run-off
6 thereafter, at which point the turnout was actually lower.

7 QUESTION: Mr. Baker --

8 QUESTION: What about the next point? Can --
9 would it be satisfactory if this election scheme basically
10 stayed in place but the winner was just certified as of
11 the General Election date? He had to be alive, his name
12 on the ballot?

13 MR. BAKER: Not at all, Justice Kennedy, and --
14 not at all, because the real election, the de jure
15 election, is in fact still on --

16 QUESTION: Well, suppose it's not de jure any
17 more. He's certified under -- Louisiana changes the law
18 simply to certify the winner on the Federal Election Date.

19 MR. BAKER: If there's no opportunity to cast --
20 if there's no possibility for a choice on Federal Election
21 Day, Louisiana has foreclosed an election on Federal
22 Election Day, and it's legally impossible --

23 QUESTION: Is that with every single election?

24 MR. BAKER: Well, if --

25 QUESTION: With every single candidate? In

1 every one of the States there has to be an opponent on the
2 final election date, on the Federal election date?

3 MR. BAKER: State law has to provide for the
4 possibility of an election. That is, there has to be the
5 possibility of an election on Federal Election Day.

6 QUESTION: Well, there is on Louisiana. If
7 the -- if one person doesn't get a majority, there will an
8 election on Election Day.

9 MR. BAKER: That's --

10 QUESTION: 20 percent of the time.

11 MR. BAKER: That's correct.

12 QUESTION: So you have no problem.

13 MR. BAKER: I have -- well --

14 QUESTION: You can go home.

15 (Laughter.)

16 MR. BAKER: Your Honor, the statute doesn't say
17 you can have an election for Federal office only 20
18 percent of the time. It says in every Federal election
19 the election must occur on --

20 QUESTION: So you demand more than a possibility
21 of an election on Election Day. What do you demand?

22 MR. BAKER: An election, Justice --

23 QUESTION: An election on Election Day. Then
24 what do you do about the States that have a filing
25 requirement and only one person files?

1 MR. BAKER: The State has provided for the
2 possibility --

3 QUESTION: Ah, you're back to possibility, now.
4 Which is it? Is a possibility enough, or does it have to
5 be a certainty?

6 MR. BAKER: A possibility is sufficient as long
7 as State law hasn't foreclosed --

8 QUESTION: Do you have a possibility here? How
9 do you distinguish the -- I mean, I wonder, you know,
10 where this case leads us to. What do you do with those --
11 what do you do with the State where only one -- both
12 parties nominate the same person?

13 MR. BAKER: Where both parties have nominated
14 the same --

15 QUESTION: You have party primaries, closed
16 party primaries --

17 MR. BAKER: Yes, sir.

18 QUESTION: And both of them nominate the same
19 person, Dwight David Eisenhower, or whoever, you know,
20 some great American --

21 QUESTION: Or Earl Warren in California.

22 QUESTION: Or Earl Warren in California, and
23 comes Election Day there's no election on Election Day.

24 MR. BAKER: If -- well, there's an election to
25 the extent that State law provided for the possibility of

1 more than one person being on the ballot. An election was
2 provided for. Through the State's ballot access rules,
3 only one person appeared to qualify for --

4 QUESTION: Through Louisiana's primary rules
5 only one person qualified. I mean, it's the same thing.

6 MR. BAKER: That's not correct, Justice Scalia.
7 Through Louisiana's -- Louisiana's primary is not a
8 qualifying primary. It elects Members of Congress in
9 October. Only to the extent that there is a failure to
10 elect in the Louisiana primary is, in fact, there an
11 election in October.

12 QUESTION: So you --

13 QUESTION: But in answer to my question you said
14 that if the certification laws were changed, and you
15 just -- and Louisiana just delayed certification until the
16 General Election, that would not be sufficient.

17 MR. BAKER: That's -- it's not a question of
18 timing or certification, Justice Kennedy. It's a question
19 of the timing of the election that selects the Member for
20 office.

21 QUESTION: It's a question of what is a de jure
22 election, I suppose, and --

23 MR. BAKER: On --

24 QUESTION: -- it's very clear that there is a
25 possibility that the de jure election will be in -- on the

1 Federal election date, and you've indicated that's all
2 that's necessary, and that's what Louisiana has.

3 MR. BAKER: No, Justice Kennedy. Justice
4 Kennedy, Louisiana has a conclusive election in its
5 October primary. The voters --

6 QUESTION: Well, only if some candidate gets a
7 majority.

8 MR. BAKER: But --

9 QUESTION: I mean, you're all tangled up in your
10 possibility language. It doesn't wash.

11 (Laughter.)

12 QUESTION: It doesn't fly. You're -- I don't
13 know what you're up here arguing.

14 MR. BAKER: Because the --

15 QUESTION: There are statutes, as my colleagues
16 have indicated, where you could end up with a two-party
17 primary, and the same candidate on the ballot in November,
18 so that it's only one name, or you could have a situation
19 where one party doesn't make a nomination, and again
20 there's only one name.

21 MR. BAKER: Your --

22 QUESTION: Is that a problem?

23 MR. BAKER: No, it's --

24 QUESTION: And Louisiana presumably could go to
25 a system whereby they still have their primary election

1 but they provide that the -- if there is a majority
2 winner at the primary election date, that name has to go
3 on the General Election ballot before it's official that
4 there's an election. Now, will that do it?

5 MR. BAKER: No, Justice O'Connor. In response
6 to your hypotheticals, those are all situations in which
7 the party primaries are not conclusive as a matter of law.
8 The party primaries have merely nominated a person who may
9 appear on the November ballot.

10 The Louisiana October primary is conclusive as a
11 matter of law.

12 QUESTION: Well then, all then -- if that's your
13 argument, then all Louisiana would have to do to meet your
14 contention is to say the October primary isn't conclusive.
15 The person still has to be alive in November and be on the
16 ballot, and it's that time that he's officially elected.

17 MR. BAKER: If it's not possible, if it's not
18 legally possible for the winner of the primary in October
19 to lose in November, if it's not -- if a State doesn't
20 allow for some other candidate to appear on that ballot,
21 if by winning that October primary you have won the
22 election, that -- you're selected for office, that's the
23 violation of the Federal statute.

24 QUESTION: Well, but then you're -- then you
25 have trouble dealing with the question whether -- where

1 both parties nominate the same candidate, and there is
2 only one candidate on the November ballot.

3 MR. BAKER: But that satisfies Federal law
4 because those primaries, Chief Justice Rehnquist, were not
5 conclusive. They did not select, as a matter of law, the
6 person for Congress.

7 A primary, as traditionally understood, merely
8 selects a person to appear on a ballot, either a partisan
9 nominee, or otherwise serves the function of -- it's a
10 ballot access funnel, and it winnows down the number of
11 candidates who will ultimately appear on a General
12 Election ballot, but it doesn't select Members of
13 Congress. An election does, and that's the crucial --

14 QUESTION: Then you're back to the Chief
15 Justice's earlier question. All you have to change in
16 this law is the determination that he's elected, and just
17 say, you know, he'll -- this is just a primary, and he'll
18 be the only candidate on the ballot in November.

19 I don't see how you can get around that, unless
20 you want to repudiate those State laws that allow partisan
21 primaries, both of which can name the same candidate.

22 MR. BAKER: Justice Scalia, we don't --

23 QUESTION: That candidate's the only name on the
24 ballot, and the same would be the case in Louisiana.
25 Whoever gets a majority in the primary, his will be the

1 only name on the ballot. What's the difference?

2 MR. BAKER: The difference is, Justice Scalia,
3 is that the hypotheticals you gave me, the two -- there
4 are two partisan primaries. The part -- that each provide
5 a place on the ballot. Neither primary is conclusive as a
6 matter of law. This Louisiana October primary is
7 conclusive, and merely delaying the --

8 QUESTION: I understand that. But I'm asking
9 the Chief Justice's question. If all that you changed
10 about Louisiana law was the statement that the primary is
11 conclusive if someone wins a majority, if you just change
12 that and say he's not elected then, he will be the only
13 name on the ballot in November, would that make you happy?

14 MR. BAKER: No, Justice Scalia.

15 QUESTION: Then you've got to tell me why that's
16 any different from the two-party primary that puts one
17 name on the ballot in November.

18 MR. BAKER: It's not -- Justice Scalia, that's
19 not an election, because there's not the possibility --
20 State law has not allowed for -- assuming there's no
21 write-in possibility, what section 7 requires is an
22 election on Federal Election Day, which --

23 QUESTION: But you're saying one thing more.
24 You're saying there's got to be a -- how shall I put
25 it? -- a legally unconditional opportunity for voting on

1 the November date. That's what you're saying, isn't it?
2 Not merely a possibility. You're saying that the
3 possibility has got to be legally unconditional.

4 Now, if the voters make a choice, as in the Earl
5 Warren case, that would not be a problem under your
6 criteria, because the law was not precluding the
7 possibility of the voting that you're talking about.
8 You're saying that the law cannot preclude that
9 opportunity, and this law does in the 80 percent of the
10 cases. Isn't that what you're arguing?

11 MR. BAKER: Absolutely, Justice Souter.

12 QUESTION: All right, and do we have to get into
13 this other issue? I mean, I don't know, maybe in
14 California my recollection is they all provided for write-
15 ins. I don't know whether they do or don't. Maybe all
16 these other -- I don't know what Louisiana will do. I
17 mean, here the statute says now a candidate who receives a
18 majority of the vote that's cast for office in a primary
19 election is elected.

20 Now, do we have to go into the question of what
21 happens if that is illegal under the statute and they
22 decide to fix it up by declaring him elected or not? Is
23 it necessary or not necessary for us to go into that?

24 MR. BAKER: It's not necessary, Justice Breyer.
25 A declaratory -- affirming the court of appeals, and the

1 declaratory judgment of the court of appeals as
2 satisfactory, then it will be the prerogative of the --

3 QUESTION: In other words, the court of appeals
4 just dealt with this language, so if they decide to fix it
5 up through this -- saying, okay, they changed the words,
6 so a candidate who receives the majority of the votes cast
7 for office in a primary election will have his name placed
8 on the ballot in November and no one else will, and there
9 are no write-ins. If that's how they fix it up, then we
10 have to deal with this question we're now discussing?

11 MR. BAKER: Absolutely, Justice Breyer.

12 QUESTION: We'll also have to deal with the
13 writing of an opinion in this case.

14 QUESTION: Yes.

15 QUESTION: I mean, we can't simply say in one
16 word, the judgment of the court of appeals is affirmed.
17 We customarily give reasons why we're affirming.

18 (Laughter.)

19 QUESTION: Sometimes.

20 MR. BAKER: I wouldn't object to that, Chief
21 Justice Rehnquist.

22 QUESTION: Well, what reasons would you suggest
23 we give for affirming?

24 (Laughter.)

25 MR. BAKER: The reasons that I would provide is

1 that the State statute is in hopeless conflict with
2 Federal law. Federal law requires a uniform national date
3 for congressional elections, Louisiana law provides for
4 conclusive congressional elections in October that cannot
5 be reconciled --

6 QUESTION: Mr. Baker, did I understand you to
7 agree with me -- I think General Ieyoub did -- that when
8 you have the two things, one is everybody votes in this,
9 call it what you will, in this thing, and to be in the
10 running you must run in this thing, that whatever label
11 you put on it, that is an election, unlike a primary,
12 where only Democrats can vote in one, Republicans can vote
13 in the -- they're not specific. This is everybody who
14 wants to vote votes in this. Everybody who wants to run
15 runs in this. What is that, and if the answer is, an
16 election, then you have a conflict with the Federal
17 statute.

18 MR. BAKER: Absolutely, Justice Ginsburg, which
19 leads me to respond to a point made by my colleague, the
20 Attorney General.

21 The Attorney General suggested that partisan
22 primaries were unknown in 1872, and he's absolutely right,
23 so this is not a situation of applying old law to new
24 facts. We're applying old law to, in fact, an election
25 system that Congress exactly understood at the time it

1 enacted this statute.

2 Congress -- in 1872 there were elections. There
3 were no pre-election primaries. But Congress also
4 anticipated that States in these elections might have
5 majority vote requirements.

6 QUESTION: But let me just -- are you --

7 MR. BAKER: Yes.

8 QUESTION: If you are, let me go back to the
9 Chief Justice's question, because I was asking seriously
10 whether we have to reach it, and to force you to focus on
11 it, I'll say, now we are writing the opinion in your
12 favor, hypothetically, and we come to the section where --
13 remember the alternative I gave you you said we didn't
14 have to reach, they change it, all right, to say only this
15 name appears on the ballot and no write-ins?

16 MR. BAKER: Correct.

17 QUESTION: All right. It is argued that it
18 would be fine to have a statute that says, no write-ins,
19 and the only name on the ballot, and that this statute is
20 the same, but that argument is unconvincing, because --
21 and now I want you to fill in the blank.

22 (Laughter.)

23 QUESTION: That's why I'm uncertain whether we
24 have to reach it. How would you fill in the blank?

25 MR. BAKER: The argument is unconvincing because

1 the election that selected the Member for office was held
2 in October, and there was no election in November, Justice
3 Breyer.

4 QUESTION: Mr. Baker, maybe I misunderstood you,
5 but I think the premise of Justice Breyer's question is
6 that it would be okay to comply just by saying that the
7 one who gets the most votes in October is on the ballot,
8 and nobody else, and nobody else qualifies. I thought
9 your answer to that was that that would not be compliance
10 with the Federal elections statute.

11 MR. BAKER: That's -- maybe I misunderstood
12 Justice Breyer's question.

13 QUESTION: So --

14 MR. BAKER: That would not comply with the
15 Federal --

16 QUESTION: But it would if you said the two top
17 runners.

18 MR. BAKER: That's -- there are numerous
19 correct, Justice Ginsburg -- there are numerous
20 possibilities for fixing this system so that it --

21 QUESTION: I see two. One is, you move the --
22 what they call the open primary to Election Day. Another
23 one is, you put the top two.

24 QUESTION: Or maybe the first and the last.

25 (Laughter.)

1 QUESTION: I mean, that would give you an
2 election on Election Day, wouldn't it?

3 QUESTION: What if you had a scheme in which the
4 Louisiana statute said, whoever gets a majority in October
5 will be on the November ballot and will be the only name
6 on the November ballot, and there will be no write-ins,
7 but unless in November that person gets at least one vote,
8 that person will not or cannot be elected, would that
9 satisfy the Federal law?

10 The reason I ask the question is, I think what
11 you're saying is, there's got to be voting on the November
12 date which is operative to elect, and in my silly
13 hypothetical there would in fact be voting in November
14 that would be operative to elect, and so that's why I'm
15 asking. Is that sort of the nub of what you're arguing
16 here?

17 MR. BAKER: It would be -- well, under your
18 hypothetical it would be legally possible to be elected or
19 not be elected if a candidate did receive a vote, as I
20 understand your hypothetical.

21 QUESTION: That's right. Nobody votes for the
22 October winner, and therefore no one is elected for that
23 office.

24 MR. BAKER: Which is distinguished from most --
25 all right, under that -- if State law were as you posited

1 it, Justice Souter, and it would only take one vote to
2 elect this person, this person was on the ballot, there
3 would be an election on Federal Election Day, but it would
4 not -- there would be serious, profound questions raised
5 whether or not this election satisfied this Court's First
6 and Fourteenth Amendment jurisprudence --

7 QUESTION: What is the reason for that? Are you
8 saying the reason is there's got to be a choice as between
9 at least two candidates on that date?

10 MR. BAKER: An election, by definition,
11 presupposes a choice. That's --

12 QUESTION: Or at least an opportunity so far as
13 State law is concerned for a choice.

14 MR. BAKER: Correct, Justice Souter.

15 QUESTION: Now, wait a minute, there is a
16 choice. You -- I mean, you don't say there has to be a
17 choice, because you say it's okay if you have two separate
18 primaries and you have no choice on Election Day.

19 MR. BAKER: But what has happened -- two
20 separate primaries that have elected the same nominee --

21 QUESTION: Yes. There's no choice.

22 MR. BAKER: The State law has not prevented that
23 choice, Justice Scalia. It's the choice of the voters in
24 a preceding -- State law has allowed for the possibility
25 of an election in November.

1 QUESTION: Why should it make any difference
2 that in one hypothesis the reason you have only one name
3 is on the ballot is there were two separate primaries and
4 in both of those the same person, and in the Louisiana
5 case there were a number of people on the ballot and only
6 one person survived.

7 MR. BAKER: The difference, Justice -- Chief
8 Justice Rehnquist is that the -- that those primaries,
9 neither primary elected as a matter of right the person to
10 office. Each primary merely selected a person who
11 happened to be the same person to appear on that ballot.

12 QUESTION: And why does that make a difference?

13 MR. BAKER: Because the State law has provided
14 for its conclusive election in November.

15 QUESTION: May I ask a question -- we're talking
16 about a lot of hypotheticals here. Since the decision of
17 the court of appeals in this case, do you know whether or
18 not the Louisiana legislature has given any attention to
19 what remedy it might provide for this, or are they just
20 sitting waiting for us?

21 MR. BAKER: Yes, Justice Stevens, they looked at
22 this in the most recent legislative session. There were
23 some efforts to address the problem, and then they decided
24 apparently to wait until this Court's disposition of this
25 case, so the legislation went nowhere.

1 QUESTION: Do you know -- have you looked up, or
2 do you know how many States other than Louisiana do not
3 allow write-ins on the November election?

4 MR. BAKER: I don't know the answer to that,
5 Justice Breyer.

6 QUESTION: Do we know if there are any others?
7 Is it common?

8 MR. BAKER: I know that Hawaii doesn't allow --

9 QUESTION: Does not?

10 MR. BAKER: Does not allow write-in --

11 QUESTION: So there are other States.

12 MR. BAKER: That's --

13 QUESTION: There are other States that don't
14 allow write-ins in the primaries?

15 MR. BAKER: Correct, Justice Breyer.

16 QUESTION: Well then, we may have to reach
17 the --

18 MR. BAKER: Section 8 --

19 QUESTION: Would you be happy if there were a
20 write-in provision? I mean, if there were just a write-
21 in?

22 MR. BAKER: Absolutely, Justice Scalia. That
23 would satisfy -- there would be an election.

24 QUESTION: There would be a real election.

25 MR. BAKER: There'd be an election. Now,

1 whether or not that election --

2 QUESTION: So I guess you'd be satisfied if we
3 allowed the -- you know, the first and the last in the
4 primary to be put on the ballot. Right?

5 MR. BAKER: If --

6 QUESTION: Anything. Just pick a name. You
7 know --

8 MR. BAKER: There -- well, not anything, Justice
9 Scalia. There has to be the -- as long as there is the
10 possibility for a choice in November --

11 QUESTION: Right --

12 QUESTION: That's the problem. I can understand
13 why you'd want to limit it, because if you can limit it
14 any way at all, even with one vote, or even with the first
15 and last, you've distinguished your case. I understand
16 that. Now we don't have to reach the others.

17 But what's worrying me now is that if we say
18 here there is no election, it's not an election, then
19 there may be X other States that suddenly will discover
20 they don't have an election in November for the reason
21 that it is more than theoretically possible that both
22 parties have selected the same nominee, and that's what is
23 driving this concern, and at the moment I don't know the
24 answer to that.

25 It seems to me a genuine concern, and that's --

1 I mean, everybody's asking you to focus on it. I don't
2 want to give up before getting the most out of your
3 thought on this that I can.

4 MR. BAKER: Well, Justice Breyer, if a State's
5 ballot access selection device is not conclusive as a
6 matter of law, that ballot access selection device in the
7 form of a primary would pass muster under the Federal
8 statutes.

9 QUESTION: In other words, you're saying that if
10 Hawaii or other States that don't have write-ins in
11 November do end up with the Democratic and Republican
12 parties selecting the same candidate, that their election
13 will be invalid. That's your position.

14 MR. BAKER: That's not my position, Justice --

15 QUESTION: All right. Well, I -- then -- it
16 sounds as if it is.

17 MR. BAKER: Well, Justice Breyer, that --

18 QUESTION: It ought to be, if I understand the
19 rest of your argument, or if it isn't, then the rest of
20 your argument has to be different. I -- You keep --

21 QUESTION: I think if people had focused on this
22 we'd have a few briefs here from other States that would
23 be concerned about it, and so I'm a little uncertain what
24 to do. It seems to me it's coming up for the first time
25 now.

1 QUESTION: Mr. Baker, I thought that you had
2 answered my question that this is an election when
3 everybody votes. I thought that was your distinction
4 between party primaries that happen to come up with the
5 same candidate but not everybody votes together, and this,
6 which you agreed, I thought, that it is an election
7 because everybody votes and everybody who's running must
8 run, that those two things in combination equal an
9 election, and if that's so, then you would distinguish
10 your case from the party primaries that may happen to come
11 up with the same candidate.

12 MR. BAKER: That's correct, Justice Ginsburg,
13 and for the added reason that those party primaries don't
14 as a matter of law select the congressional officer. They
15 simply have selected a nominee who will appear on a
16 ballot, and if by happenstance the same person has been
17 chosen by the respective Democratic and Republican
18 primaries, the election is still held in -- the conclusive
19 election is held in November, and the primaries were not
20 legally -- were not the legal selection of the
21 congressional officer.

22 QUESTION: And Louisiana has been candid in
23 describing its system, because it says, if you have
24 somebody who comes out of this race, whatever it is, with
25 a majority vote, that person is elected.

1 MR. BAKER: Correct. That's correct, Justice
2 Ginsburg, and section 8, the companion statute to section
3 7, 2 U.S.C. section 8, is a statute that answers this --
4 that gives us the answer in this case.

5 Elections in 1872 were like the elections that
6 Louisiana has today. Everybody appeared at the polls.
7 Everybody voted. In most States, a plurality election was
8 sufficient to elect a person to Congress, but a number of
9 States have majority vote requirements as does Louisiana
10 today, so therefore Congress inserted section 8 into title
11 2 to provide for the contingency of a failure to elect on
12 Federal Election Day, and that's the statute that
13 Louisiana could follow and have its post Federal Election
14 Day run-off if it so chose to do that.

15 If there are no further questions, that
16 concludes my argument.

17 QUESTION: Thank you, Mr. Baker.

18 General Ieyoub, you have 2 minutes remaining.

19 GENERAL IEYOUB: Mr. Chief Justice, and may it
20 please the Court, I have no rebuttal.

21 CHIEF JUSTICE REHNQUIST: Thank you. The case
22 is submitted.

23 (Whereupon, at 12:02 p.m., the case in the
24 above-entitled matter was submitted.)
25

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:

MURPHY J. FOSTER, JR., GOVERNOR OF LOUISIANA, ET AL., Petitioners v. G.
SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF AND BENNIE
BAKER-BOURGEOIS
CASE NO: 96-670

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

BY Donna Maria Fedirko

(REPORTER)