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**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW,
AND KIMBERLY J. ENDERSON, Apellants, v.
REPUBLICAN PARTY OF VIRGINIA, ET AL.,

CASE NO: No. 94-203

PLACE: Washington, D.C.

DATE: Monday, October 2, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

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FORTIS MORSE, KENNETH CURTIS :
BARTHOLOMEW, AND KIMBERLY J. :
ENDERSON, :
Appellants, :
v. : No. 94-203
REPUBLICAN PARTY OF VIRGINIA, :
ET AL., :
- - - - -X

Washington, D.C.

Monday, October 2, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

PAMELA SUSAN KARLAN, ESQ., Charlottesville, Virginia; on behalf of the Appellants.

PAUL BENDER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Appellants.

E. DUNCAN GETCHELL, JR., Richmond, Virginia; on behalf of the Appellees.

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

2 (10:03.m.)

3 JUSTICE STEVENS: We will now hear argument in
4 Number 94-203, Morse v. The Republican Party of Virginia.

5 You may proceed.

6 ORAL ARGUMENT OF PAMELA SUSAN KARLAN

7 ON BEHALF OF THE APPELLANTS

8 MS. KARLAN: Thank you. Justice Stevens, and
9 may it please the Court:

10 This case presents the question whether
11 section 5 of the Voting Rights Act requires a preclearing
12 method of nominating candidates for the United States
13 Senate that restricts the right to vote to persons who
14 give \$45.

15 Under the facts of this case, if you don't pay
16 \$45, you have absolutely no say in how the Republican
17 nominee for Senate in Virginia is selected.

18 Section 5 requires the preclearance of all
19 voting standards, practices or procedures, or
20 prerequisites to voting, no matter how small the change,
21 and was enacted to keep States and political parties from
22 denying the recently won gains in registration under the
23 Voting Rights Act.

24 In Presley v. Etowah County Commission, this
25 Court reaffirmed the broad scope of section 5, and

1 identified once again a series of categories or typologies
2 of case which require preclearance, and under the facts
3 alleged in our complaint, this case falls within two of
4 those typologies.

5 QUESTION: Ms. Karlan, may I inquire, your brief
6 suggests possibly three different theories of why
7 section 5 might have been violated, and the first is that
8 the \$45 fee affects the process of selecting the nominee,
9 and the second is that being a delegate to the convention
10 is an elective party office, and third is the threat that
11 the change from a primary election to a nominating
12 convention required preclearance.

13 Now, were either of those last two theories
14 contained in the complaint, and were they raised below?
15 Are they actually here, or do we just look at the \$45 fee
16 question?

17 MS. KARLAN: Well, Your Honor, they were
18 properly presented below. As Your Honor knows, this case
19 came up on an expedited schedule with no discovery
20 permitted to the plaintiffs.

21 The result was that we found out when we
22 received the affidavit of David Johnson contained in the
23 Joint Appendix that the Republican Party had switched from
24 a primary to a convention, and that this fee effective --
25 this fee would only be possible were that change in there.

1 We then raised that issue at oral arguments --

2 QUESTION: The change from a primary to a
3 convention, was that -- it was not part of your complaint?

4 MS. KARLAN: No, Your Honor, it was not part of
5 our complaint.

6 QUESTION: You talked about it.

7 MS. KARLAN: That's correct. Under our
8 complaint, the facts of which must be taken as true for
9 these purposes, we alleged that this was in effect a
10 primary election itself, because as we alleged, and the
11 district court assumed, anyone who pays \$45 is entitled to
12 go and cast a vote for a nominee.

13 QUESTION: Well, the court below did not deal
14 with those -- with the second and third so-called
15 theories?

16 MS. KARLAN: No, Your Honor, it did. It held
17 that nothing connected with the convention required
18 preclearance, not the imposition of a fee, not the rules
19 governing who could attend, and not the decision under
20 section --

21 QUESTION: But do you think it dealt with the
22 issue of whether the change itself from a primary to a
23 convention required preclearance?

24 MS. KARLAN: It said, Your Honor, that nothing
25 connected with the convention, including implicitly the

1 decision to hold one, is covered --

2 QUESTION: And certainly not expressly. It
3 didn't expressly deal with that, did it?

4 MS. KARLAN: No, Your Honor, but under Federal
5 Rule of Civil Procedure 15, we were entitled to conform
6 the pleadings to the proof, and had this case not been
7 done in the expedited manner in which it was done, we
8 could have amended the complaint.

9 Now, under Rule 15, the failure to amend the
10 complaint need not keep the Court from reaching that
11 issue.

12 If this Court concludes that that's the central
13 question, and that that issue wasn't sufficiently
14 developed, then the proper response from the Court would
15 be to reverse the judgment of the district court granting
16 the motion to dismiss, and remand for further proceedings
17 in which that issue can be expressly litigated.

18 Now, there are two theories of section 5 alleged
19 in the complaint under which, under the text of the Voting
20 Rights Act, this practice is covered. The first of these
21 is that the Republican Party's practices here, given the
22 facts alleged, constitute a primary in and of themselves.

23 A primary election, after all, is an election in
24 which individual voters who are adherents of a political
25 party nominate a candidate by casting ballots.

1 QUESTION: Ms. Karlan, may I ask you a
2 preliminary question -- at least, I think it's preliminary
3 to that.

4 The section that you're dealing with speaks of
5 "whenever a State or a political subdivision." It seems
6 to be addressed to a State or a political unit of a State.
7 How, then, can you proceed under section 5 against a
8 political party?

9 MS. KARLAN: Well, Justice Ginsburg, a political
10 party under the circumstances of this case is a State
11 actor in the same way that the Fifteenth Amendment by its
12 terms simply guarantees the right to vote against
13 abridgement or denial by a State, and has been held to
14 cover political parties when they're engaged in the public
15 nominating function.

16 QUESTION: I can see that -- you -- you're
17-- referring to constitutional -- decisions under the
18 Constitution like Terry and Smith v. Allwright, but here
19 we have a statute, and the statute addresses State or
20 political subdivisions. Is there any definition of those
21 words in the statute itself?

22 MS. KARLAN: There is no definition of State in
23 the statute itself, Your Honor. The statute was by its
24 terms specifically enacted to enforce the guarantees of
25 the Fifteenth Amendment, and thereby it seems clear from

1 the legislative history intended to reach political
2 parties as well.

3 For example, we cite in our brief, Your Honor,
4 the statement from the House subcommittee of the Judiciary
5 that was responsible for the hearings on section 5 stating
6 directly an election of delegates to a State party
7 convention is covered, and a statement by Representative
8 Bingham, the author of the language defining the term
9 "vote" in section 14(c)(1), making clear that party
10 canvases and caucuses that selected people who were
11 involved in the nomination of candidates to public office
12 were covered by the act because they were State actors.

13 QUESTION: Ms. Karlan, how can that be? Can I
14 not follow a political party that -- say a feminist group
15 wants to start a women's political party. Only women can
16 be members. Anybody in the world can vote for their
17 candidates, but it's a women's party. That's not
18 permitted under this legislation? It's action by the
19 State simply because that party excludes men from
20 participating in the political party?

21 MS. KARLAN: Your Honor, section 5 of the Voting
22 Rights Act would not cover the decision to form a party as
23 discriminatory on the basis of race, but the Nineteenth
24 Amendment --

25 QUESTION: Their selection of a candidate.

1 Their selection of a candidate.

2 MS. KARLAN: The Nineteenth Amendment, Your
3 Honor, would say that if that party performs the public
4 electoral function of nominating a candidate for United
5 States Senator, they would be covered by the Constitution.

6 QUESTION: May I ask if the Virginia statutes
7 draw a distinction between new parties such as Justice
8 Scalia's feminist party, and established parties like the
9 Republican Party and the Democratic Party?

10 MS. KARLAN: Yes, Justice Stevens, but --

11 QUESTION: What is the difference under Virginia
12 law?

13 MS. KARLAN: Under Virginia law, a political
14 party within the meaning of the Virginia statute only
15 comes into being if at one of the last two Statewide
16 general elections some candidate of that party received
17 10 percent of the votes cast for Statewide office, so that
18 the party to which Justice Scalia refers would not itself
19 be covered.

20 However --

21 QUESTION: Unless it was successful.

22 MS. KARLAN: Ultimately, yes.

23 QUESTION: And won election, and thereupon it
24 would have to be, I suppose, disbanded.

25 MS. KARLAN: Under the Nineteenth Amendment,

1 which is not at issue in this case, yes, Your Honor, which
2 says that no State shall abridge or deny the right to vote
3 on account of sex.

4 QUESTION: Well, but the question is whether or
5 not this is a State or a political subdivision, and it
6 seems to me in light of the two cases Justice Ginsburg
7 mentioned, Terry v. Adams and Smith v. Allwright, that you
8 have a difficult position to maintain.

9 The Congress was well aware of those cases.
10 They were well aware of the White Primary cases, and yet
11 they used the words, State and political subdivision.
12 They didn't say, or any other entity which is a State
13 actor --

14 MS. KARLAN: Well, but --

15 QUESTION: -- and that's what you want -- and
16 you want us to say the latter.

17 MS. KARLAN: Well, but Justice Kennedy, the
18 provision under which the exclusions in Terry and in
19 Smith v. Allwright were found discriminatory was a
20 provision that only applied to the States, so Congress
21 could reasonably assume that if it was State action for a
22 political party to bar someone from a preprimary in which
23 there was no governmental involvement whatsoever --

24 QUESTION: I am assuming that State action cases
25 are correct. The point is, is that this jurisprudence was

1 in front of the Congress, and they chose this rather
2 limited language.

3 MS. KARLAN: No, Your Honor, this language is
4 not limited. This is the same language under which the
5 courts held that political parties were covered.

6 Now, Your Honor --

7 QUESTION: The court held political parties were
8 covered in those cases when election as the nominee of
9 that political party was effectively election to the
10 office.

11 MS. KARLAN: No, Your Honor --

12 QUESTION: That's quite a different situation
13 from what one has here.

14 MS. KARLAN: No, Your Honor. In United
15 States v. Classic, the case on which both Smith and Terry
16 rely, the court said that the primary was an integral part
17 of the election process whether it always, sometimes, or
18 never resulted in the election of a candidate.

19 QUESTION: No question about that, but those
20 cases did not purport to be interpreting this language.
21 This statute was later enacted, and they did not focus on
22 the words, State or political subdivision. They talked
23 about State action, of course.

24 MS. KARLAN: Well, Your Honor, if I may draw a
25 historical point not in the record, in 1965, the States

1 that were covered by the Voting Rights Act were all States
2 in the solid South, which was solidly Democratic. Had
3 Congress passed a law with the understanding that you have
4 advanced, one that didn't apply to political parties, it
5 is patently clear that the Voting Rights Act would have
6 been strangled at its birth, because all of the
7 discrimination would simply have been conducted by the
8 Democratic Party in the South, and the Voting Rights Act
9 would have been a dead letter.

10 Now, it's clear that that's so from both the
11 statement in the House report and Representative Bingham's
12 statement of what the language involving voting was
13 intended to cover.

14 QUESTION: Well, Ms. Karlan, the Attorney
15 General has adopted a number of regulations pursuant to
16 section 5 and the provisions of the Voting Rights Act. Do
17 you concede that all the Attorney General's regulations
18 that are relevant here are valid?

19 MS. KARLAN: I believe that they are all valid,
20 yes, Your Honor, and they do provide that when political
21 parties perform the State --

22 QUESTION: And you rely on those regulations to
23 make your case?

24 MS. KARLAN: They certainly support our case,
25 but even if those regulations were invalid, our case would

1 go forward, because our claim is that this is a primary
2 election in the same way that the behavior in Terry is a
3 primary --

4 QUESTION: Do you think that absent those
5 regulations, your position would be sustained here?

6 MS. KARLAN: I would hope so, Your Honor.

7 I don't think our position depends on the
8 Attorney General's regulations. His regulations are based
9 on the same understanding which we have advanced, which is
10 that State action covers a political party when it's
11 engaged in the process of nominating a candidate for
12 public office.

13 QUESTION: Ms. Karlan, you say that this would
14 not have been -- it would have been a dead letter if it
15 couldn't have been applied against the Democratic Party in
16 the South in the era when it was enacted.

17 How many times was it applied against the
18 Democratic Party in the South?

19 MS. KARLAN: Your Honor, I only have the list of
20 the number of times where objections were lodged, and that
21 was about a dozen. There's a citation to the Turner
22 affidavit by the Assistant Attorney General.

23 QUESTION: How recent is that dozen?

24 MS. KARLAN: That was in 1982, Your Honor.

25 QUESTION: 1982, a good deal after the South

1 was --

2 MS. KARLAN: No, that was --

3 QUESTION: -- in the situation that you
4 described.

5 MS. KARLAN: No, Your Honor, that's a list of
6 all of the objections imposed as of the date 1982, not
7 objections in the year 1982.

8 QUESTION: Just 12.

9 MS. KARLAN: Yes, Your Honor.

10 QUESTION: Ms. Karlan, may I go back to the
11 textual argument?

12 You -- if I understand what you're saying,
13 you're saying that "State" is to be construed to include
14 anyone who exercises a State function. The process of
15 winnowing candidates down is a State function, therefore,
16 it applies here. Is that --

17 MS. KARLAN: Yes, Your Honor.

18 QUESTION: -- basically what you're saying?

19 If that's the way the Congress intended the word
20 State to be construed, why did it refer to political
21 subdivision at all?

22 Because it seems to me -- maybe I'm missing
23 something, but it seems to me that political subdivision
24 would be included on your definition without specific
25 reference to it, without the need for specific reference

1 to it, whenever it was engaged in -- in effect in
2 discharging any of the processes by which the State
3 government would ultimately bring an election or a series
4 of choices to be made in election before the people, so
5 why is it in there at all?

6 MS. KARLAN: The reason it's in there, Justice
7 Souter, is because section 5 of the Voting Rights Act only
8 applies to particular places.

9 Sometimes those places are entire States, but in
10 some cases, like North Carolina or New York, only
11 particular political subdivisions, only particular
12 geographic regions --

13 QUESTION: Ah. Ah.

14 MS. KARLAN: -- are covered by the statute at
15 all.

16 QUESTION: Okay.

17 MS. KARLAN: So if you only provided no State,
18 it wouldn't define, for example, the preclearance cases
19 that this Court has seen from North Carolina or from New
20 York, UJO v. Carey, for --

21 QUESTION: Why is that? Wouldn't a political
22 subdivision still be a State? Wouldn't it still be State
23 action?

24 MS. KARLAN: No, Your Honor. It's not fair to
25 define State action here to define which geographic areas

1 of the country are covered, because if you only said
2 State, then that wouldn't explain why, for example, a
3 change in electoral rules in Manhattan is covered but not
4 a change in Westchester County. That's when the
5 triggering provisions --

6 QUESTION: Well, at least it would have been a
7 serious question. I mean --

8 MS. KARLAN: That's correct.

9 The triggering provisions of section 4 identify
10 political subdivisions for purposes of deciding what's
11 covered by preclearance, not for purposes of deciding what
12 the standard is, or whom the actor is.

13 If there are no further questions, I'll --

14 QUESTION: I have one further question.

15 Under your view, if, in a covered jurisdiction,
16 there is a small group of citizens, two or three of them,
17 who have substantial community influence and many, many
18 funds, if they meet in someone's home to decide who's
19 going to be the candidate, and their voice is in effect
20 conclusive as to who will be the successful candidate in a
21 particular party, are they covered?

22 MS. KARLAN: No, Your Honor.

23 QUESTION: Why?

24 MS. KARLAN: Because they are not exercising a
25 delegated State function, as the Virginia Republicans are

1 under section 509(B) in this case.

2 QUESTION: Mr. Bender.

3 ORAL ARGUMENT OF PAUL BENDER

4 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

5 SUPPORTING THE APPELLANTS

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

8 Under Virginia law, a political party that gets
9 10 percent or more of the vote at an election is entitled
10 to place the candidate it selects for the U.S. Senate on
11 the ballot in a preferred position as long as the party
12 maintains a certain kind of organization prescribed by the
13 State.

14 The party is then entitled under Virginia law to
15 choose its candidate either through a primary, or through
16 a convention, or through some other means.

17 Both the district court and the appellees in
18 this case agree that if the party chooses to choose its
19 candidate through a primary election, that changes in the
20 rules about who can vote at that primary election to
21 choose the candidate are covered by section 5. I think
22 that's common ground.

23 The district court, however, decided that if the
24 party chooses not to use the primary elections as a way of
25 choosing its candidates, but instead to choose through a

1 convention, then section 5 does not apply.

2 QUESTION: Well, Mr. Bender, I can understand an
3 argument to the effect that if the State permits a party
4 to change from a primary election to a convention method,
5 that that action by the State in allowing that change is
6 something that in and of itself could be challenged under
7 section 5, but I'm not sure that's what was done here.

8 I'm not sure that question is here before us,
9 and we're reaching it by a very different route, as I see
10 it.

11 MR. BENDER: I think the question is whether,
12 under State law, a party or any other group has a right to
13 put a candidate on the ballot in a preferred position if
14 they maintain a certain organization. Those are the facts
15 of this case.

16 If a party is given that power under State law,
17 whether, when the party makes a change and who can
18 participate in that selection process, whether that is
19 subject to preclearance --

20 QUESTION: Well, back up a minute. Do you think
21 that it would be open to challenge under section 5 if the
22 State allows a change from a primary election to a
23 convention method?

24 MR. BENDER: Yes, if the State -- if State law
25 did that --

1 QUESTION: Do you think that question is before
2 us in this case?

3 MR. BENDER: I don't think that question is
4 before you in this case. I think the district court did
5 not decide that question. If -- it's unclear in this case
6 whether that kind of change was made, because they
7 apparently have never used a -- have never used a primary,
8 even though on a couple of occasions the party has said it
9 was going to have a primary.

10 That question of whether that change was made
11 has not been decided below and would have to be remanded,
12 but I don't think you have to do that, because the change
13 in -- it seems to me the basic principle here is that the
14 change in the people who can select a candidate to go on
15 the ballot is a change sufficiently related to the general
16 election so that that change needs to be precleared, and
17 that's true whether the change occurs through a matter of
18 State law, or the change occurs through a matter of city
19 law, or county law, or political party law when the
20 political party is given the right to put the candidate on
21 the ballot in a preferred position.

22 QUESTION: Mr. Bender, what do you mean by a
23 preferred position? Suppose a State just says, every
24 party that in the last election got 1 percent or more of
25 the vote is entitled automatically to be listed on the

1 ballot in the next election?

2 MR. BENDER: I think that case would come out
3 the same way --

4 QUESTION: It would come out --

5 MR. BENDER: -- although it's a little bit
6 closer.

7 QUESTION: That gives the Government the right
8 to require that party to submit to the Government for its
9 approval any change in the process by which that party
10 selects its candidates?

11 MR. BENDER: I wouldn't say any change in the
12 process by which the party selects the candidates. I
13 think this case involves something that's very close to
14 the election process, and that is the people who can
15 select the party's candidates.

16 If you affirm the decision of the district court
17 in this case, that would mean that in a State like
18 Virginia, where parties have an automatic place on the
19 ballot, that major parties could preclude members of
20 certain races from voting for the candidate to go on the
21 ballot.

22 QUESTION: It's very close to the political
23 process, but it's also very close to freedom of
24 association.

25 MR. BENDER: Right.

1 QUESTION: The ability of people to band
2 together under what rules they desire to take political
3 action.

4 MR. BENDER: And I think the --

5 QUESTION: Your position is that by simply
6 agreeing to put whoever forms such an association on the
7 ballot, the State acquires considerable control over the
8 manner in which those people have to conduct their
9 political life.

10 MR. BENDER: I think the Attorney General's
11 regulations about the coverage of political parties, which
12 have existed since 1982 -- the Attorney General has
13 actually precleared party submissions since 1972, and
14 has --

15 QUESTION: A few of them. How many has he
16 precleared?

17 MR. BENDER: Over 1,000.

18 QUESTION: Party submissions?

19 MR. BENDER: Yes.

20 QUESTION: In what -- outside of the context of
21 primaries?

22 MR. BENDER: No. Including the context of
23 primaries.

24 QUESTION: How many outside of the --

25 MR. BENDER: About --

1 QUESTION: -- context of primaries?

2 MR. BENDER: Over -- between 300 and 400 outside
3 of the context of primaries.

4 One, for example, comes from Virginia, which is
5 in the lodging that was made with the Court.

6 In 1982, the Democratic Party in Virginia
7 precleared, and Assistant Attorney General Reynolds tried
8 to preclear, and Assistant Attorney General Reynolds did
9 preclear a change almost identical to the change, in terms
10 of its relation to the voting process almost identical to
11 the change in this case.

12 It was a change in the way the vote was going to
13 be allocated at the party's convention, and they -- the
14 Democratic Party in Virginia applied for preclearance, and
15 preclearance was given, and as I say, there have been over
16 300 of those kinds of submissions over the years.

17 The Attorney General's regulations --

18 QUESTION: It's a necessary part of your
19 position, is it not, that you cannot form a party on any
20 basis that it would be unconstitutional or unlawful for
21 the State to discriminate on the basis of?

22 MR. BENDER: The key to this case is the State's
23 relationship to the party. If -- people can form a party,
24 form a group as in Justice Kennedy's question, and decide
25 that they're going to support a nominee at the election,

1 and if you need 15,000 signatures to put their nominee on
2 the ballot, they're going to go out and get the 15,000
3 signatures.

4 If five of them have been doing that for
5 10 years and decide let's let a sixth person into that
6 group, there needs to be no preclearance, because there
7 isn't the kind of connection there is here between State
8 law and what the party does. Parties have an official
9 position --

10 QUESTION: But if the State agrees to let them
11 on the ballot, the State can effectively preclude a party
12 from being formed that is all black, that is all white,
13 that is all rich people, that is all poor people, or
14 whatever.

15 MR. BENDER: If it lets them on the ballot in
16 the same way it lets anybody else on the ballot, then
17 preclearance doesn't apply.

18 QUESTION: 1 percent of --

19 MR. BENDER: Preclearance applies when it has
20 special rules for parties, and it -- don't -- I don't
21 think you should denigrate the preferred position that
22 parties get. In Virginia, they are listed first on the
23 ballot. Every study of elections that I know says that
24 that is worth an enormous amount, to be listed before the
25 independent candidates. Virginia has given them that

1 privilege.

2 QUESTION: So we will only prevent these
3 specialized parties when they're successful.

4 MR. BENDER: No, not when they're successful.
5 We only require preclearance of the party's rules when the
6 party is given by the State some power that other people
7 don't have.

8 The Attorney General's regulation under
9 section 5 attempts to cut down -- this Court's decisions
10 about what has to be precleared because of its
11 relationship to a general election are very broad,
12 starting with the Allen case.

13 QUESTION: And is that rationale that you're
14 offering to us now that the delegated power, the preferred
15 position, is that what makes it a political subdivision
16 under the statute?

17 MR. BENDER: No, it's not a political
18 subdivision, Justice Kennedy, it's the State under the
19 statute.

20 QUESTION: A State.

21 MR. BENDER: The concept of the State. As
22 Ms. Karlan said, the political subdivision is in there
23 because they're talking about the coverage formula. The
24 two things are --

25 QUESTION: But that's what makes it the State.

1 MR. BENDER: And as the Court said in Sheffield,
2 the concept of State and political subdivision are
3 territorial, and within that territory, every entity, as
4 Sheffield said, which would be the State under the Court's
5 State action principles -- and it's clear that a party in
6 this respect would be the State.

7 Every entity that would be the State is covered,
8 so the State is used in section 5 as the word State is
9 used in this Court's State action jurisprudence, not in
10 the formal sense of the State, and you can see that in the
11 Dougherty case, for example, where a school board put a
12 financial burden on an employee and said they had to take
13 a leave in order to run for election, and the Court held
14 that that had to be precleared. Now, that school board
15 has nothing to do with voting.

16 QUESTION: Well then, the term State is
17 coterminous with our State action jurisprudence?

18 MR. BENDER: Yes, except that the Attorney
19 General's regulations should be given a lot of deference
20 in dealing with that definition, and the Attorney
21 General's regulations have tried to trim that concept some
22 so as not to interfere with the constitutionally protected
23 right of political association.

24 QUESTION: Mr. Bender, I thought you had said
25 that State is not coterminous with State action, because

1 you're saying that the addition of this element of
2 preference, as you put it, is crucial.

3 You said that if a State allowed any party onto
4 the ballot on the same -- to place a candidate on the
5 ballot on the same terms as any other party, that that
6 would not trigger applicability, and yet that would be
7 State action, would it not, because each of the parties,
8 including the little splinter group that was in the hypo,
9 would be performing a State function of winnowing
10 candidates down?

11 MR. BENDER: I think the question, Justice
12 Souter, is whether the action of a group of people in
13 deciding who they're going to support for election, who
14 they're going to go out and get signatures for, is State
15 action, and I'm very doubtful whether, if five of us get
16 together and decide to get 50,000 signatures --

17 QUESTION: Okay, but once they organize
18 themselves and say, the five of us are going to be the X
19 Party, and the State says, yes, five signatures on a
20 petition is enough to get on the ballot, they would then
21 be, on your theory, performing State actions.

22 MR. BENDER: I don't think so. I think the line
23 would be drawn there if they're treated --

24 QUESTION: Why?

25 MR. BENDER: May I finish answering --

1 QUESTION: Finish the answer.

2 MR. BENDER: If they're treated just like any
3 other group of people, then I don't think they are. At
4 least under --

5 QUESTION: But they are performing the State
6 function even in that case.

7 MR. BENDER: They are performing a State
8 function -- I don't think so. I think -- I don't see how
9 deciding who you're going to support for election is
10 performing a State function.

11 QUESTION: So winnowing possible candidates down
12 is not a State function.

13 MR. BENDER: Not in itself, no.

14 QUESTION: Okay.

15 QUESTION: Thank you, Mr. Bender.

16 Mr. Getchell.

17 ORAL ARGUMENT OF E. DUNCAN GETCHELL, JR.

18 ON BEHALF OF THE APPELLEES

19 MR. GETCHELL: Justice Stevens, and may it
20 please the Court:

21 The opinion of the district court should be
22 affirmed because it's in accord with the plain meaning of
23 the statute and the regulation.

24 The Voting Rights Act applies to a State or
25 political subdivision which is covered by certain terms in

27

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1 section 4 of the act when that State or political
2 subdivision alters a qualification or prerequisite for
3 voting or a standard practice or procedure without -- with
4 respect to voting and voting, as you would expect in a
5 statute about voting, is a defined term, and voting is
6 defined as those actions necessary to make a vote
7 effective in a primary, special, or general election.

8 QUESTION: Mr. Getchell, do you concede the
9 validity of the Attorney General's regulations here?

10 MR. GETCHELL: Not if they are construed as the
11 Attorney General would have them be construed, because I
12 think that would raise grave First Amendment issues.

13 QUESTION: Well, the regulations seem to extend
14 the application to political parties in some
15 circumstances. Do you concede that that's a valid
16 interpretation, that a political party can be a State
17 actor?

18 MR. GETCHELL: There are certain actions
19 performed by the political parties which are clearly
20 delegated public electoral functions, involving
21 exclusively --

22 QUESTION: Well, could you answer my question?
23 Do you concede that a political party can be a State
24 actor?

25 MR. GETCHELL: It can be.

1 QUESTION: Under the statute?

2 MR. GETCHELL: It can be. I think the only area
3 where it ever is is when it is conducting a primary, and
4 when it is setting rules for a primary, because a primary
5 implicates the machinery of the State, the electoral
6 machinery of the State, the state ballot boxes, the State
7 officers, the State polling places. It has traditionally
8 been a State function because it's neutral. It exists
9 only to count votes.

10 On the other hand, a convention is intensely
11 political. The nominating process itself, the decision to
12 nominate anybody, is personal and political, it's not --

13 QUESTION: Well, that's a curious line to draw,
14 because where the State is conducting primary election
15 activities by way of administering them, I assume that any
16 change can be challenged by a suit against the State
17 itself, so the line you would draw is a little curious, I
18 would think.

19 MR. GETCHELL: I think the line that I have
20 drawn is the one that the Attorney General sought to draw
21 in the regulation. The statute itself doesn't address
22 political parties at all. The regulation says that the
23 party --

24 QUESTION: No. So I would have thought you
25 might just say, well, the statute doesn't reach political

1 parties, but that's not your approach.

2 MR. GETCHELL: It does not reach political
3 parties on its face. The jurisprudence that has developed
4 in the lower courts has drawn the distinction between
5 primaries when it is deemed to be acting as the State and
6 conventions and other --

7 QUESTION: What jurisprudence are you talking
8 about?

9 MR. GETCHELL: I am talking about Williams v.
10 The Democratic Party, which this Court summarily affirmed
11 in 1972. The Congress has twice readopted the Voting
12 Rights Act since then, presumably knowing of that
13 jurisprudence. Basically, that case said it does not
14 apply to conventions.

15 MacGuire v. Amos, decided the same year,
16 although it was dicta in a footnote, distinguished
17 Williams v. Democratic Party to note that a convention was
18 not involved in the Alabama case.

19 So without conceding that in all circumstances
20 that that regulation is valid, it was not our purpose to
21 challenge the regulation. Our purpose was to say that the
22 regulation clearly excludes us, because the regulation
23 only applies to a political party if 1) the political
24 party is exercising a traditional public electoral
25 function, and b) that function has been delegated.

1 QUESTION: Well, Mr. Getchell, is it fair to say
2 that it is only exercising that function, on your view, if
3 it is in fact using traditional State machinery?

4 MR. GETCHELL: Yes, Your Honor.

5 QUESTION: So that in -- it is fair to say, I
6 take it, then, on your view that although there are some
7 circumstances in which the party would be covered, there
8 are no circumstances in which the party would be covered
9 which could not also be subject to a challenge directly to
10 the State itself.

11 MR. GETCHELL: I believe that to be the case,
12 Your Honor.

13 QUESTION: Okay.

14 QUESTION: So if we had a \$45 fee for a primary,
15 that would be subject to preclearance, is --

16 MR. GETCHELL: Well, if it were viewed as a
17 direct qualification for voting in the primary, it
18 presumably would be. On the other hand, if it were viewed
19 as a delegate registration fee, this Court has struck down
20 exorbitant delegation -- I mean, delegate or candidate
21 registration fees, but it said that it was not saying that
22 they were improper in all circumstances.

23 QUESTION: But if the convention, as I
24 understand it, is effectively a substitute for the
25 primary, they both serve the same function in selecting

1 candidates who will appear in preferred positions on the
2 ballot, the function is identical, is it not? Then why
3 shouldn't the coverage be the same?

4 MR. GETCHELL: I would commend to Your Honor the
5 law review article by a Professor Weisburd that we have
6 cited several times in our briefs, where he makes the
7 political science point that they're quite different
8 animals.

9 The State provides neutral electoral machinery.
10 It has no valid interest but that the votes be fairly
11 counted.

12 The convention is a voluntary, grassroots
13 meeting of people who are seeking a very unneutral end.
14 They are exercising their core First Amendment rights, and
15 anything that attempts to trench on that would have to be
16 justified by compelling State interest and a narrowly
17 tailored piece of legislation.

18 QUESTION: In your view, then, would this \$45
19 fee stand on the same level as, say, the requirement of
20 passing a literacy test?

21 MR. GETCHELL: No, Your Honor. This --
22 practically, what this \$45 fee is is reflected by the fact
23 that we are dealing with a voluntary organization.

24 Because we have the largest political primary,
25 we believe, in the western -- I mean, not -- we have the

1 largest convention, although they call it a primary. I'm
2 getting ahead of myself -- they want to criticize our
3 convention. They want to call it an indoor primary
4 because it's so inclusive. Then, at the same time, they
5 want to say it's exclusive because a fee is charged.

6 Because the convention is so large, with 14,000
7 delegates at the most recent convention, we have to hire
8 the largest hall in the Commonwealth of Virginia, and it
9 costs money.

10 In the affidavit that was filed with respect to
11 the '93 convention, the number was \$300,000.

12 QUESTION: So you're saying the difference in
13 that and a literacy test is that yours is a more
14 reasonable requirement?

15 MR. GETCHELL: I don't see --

16 QUESTION: But we're asking about whether or not
17 this --

18 MR. GETCHELL: I --

19 QUESTION: -- the hypothetical literacy test is
20 subject to challenge under either the act or the
21 Constitution.

22 MR. GETCHELL: I may have misunderstood the
23 hypothetical. If you are asking whether or not the party,
24 or a party could do unreasonable things, extreme things,
25 be a feminist party, be a racial party, be a party of

1 plutocrats or a party of intellectuals, yes, as long as it
2 doesn't have State action, it can.

3 QUESTION: So in your --

4 MR. GETCHELL: It would be suicidal.

5 QUESTION: In your view -- this is what I -- I
6 mean, the -- it's a difficult question, I realize, but I
7 put the obvious question to you. In your view, if the
8 Democratic Party or the Republican Party, neither of which
9 would, but there used to be a problem, if either of them
10 said, I have a primary, and only white people can vote, we
11 agree that's illegal.

12 MR. GETCHELL: We agree that's covered.

13 QUESTION: All right. So now what they do is,
14 we're not going to have a primary. Rather, we're going to
15 call every voter who wants to come and vote in the primary
16 to come to my meeting, whoever wants to come, and we will
17 vote, and we'll call it a convention, and only white
18 people can vote.

19 That, in your opinion, the Voting Rights Act
20 just doesn't cover, and that's what I can't quite
21 understand, why the people who would have written this
22 Voting Rights Act would have wanted not to cover that
23 possible situation, since it did exist many years ago.

24 MR. GETCHELL: They -- I think they very
25 definitely wanted to avoid any collision with First

1 Amendment Rights.

2 QUESTION: So you're saying they didn't want to
3 cover the possibility that the Democratic Party in the
4 South, or the Republican Party, would say, oh, we no
5 longer can insist only whites vote at the primary, so what
6 we'll do is, we'll do exactly the same thing but call it a
7 convention.

8 MR. GETCHELL: I am saying --

9 QUESTION: You're saying they didn't want to
10 cover that obvious situation, despite Terry v. -- you
11 know, the cases that seem quite similar.

12 MR. GETCHELL: I am saying simply, Justice
13 Breyer, that they didn't cover it.

14 Now, it could be --

15 QUESTION: Maybe they wanted to but didn't think
16 they had the power to.

17 MR. GETCHELL: Well, I believe they would have
18 very grave constitutional problems.

19 QUESTION: Right, and the evidence that they
20 didn't want to cover it, even though there was a Supreme
21 Court case right on point which said that it was covered
22 under the Constitution, the evidence that they didn't want
23 to cover it is what?

24 MR. GETCHELL: I would submit that it is first
25 in the plain language of the statute.

1 I would submit that it's secondly in the fact
2 that the statute has twice been reaffirmed, or repassed,
3 knowing what the jurisprudence was.

4 I would say that the prior practice is not that
5 convention rules have been cleared. Only one has been
6 brought to this Court's attention, one incidence when the
7 Democratic Party of Virginia did it in 1982, whether in
8 error or out of an abundance of caution I do not know.

9 I would say that on the legislative history,
10 that all of the legislative history is either for my
11 position or neutral, except for the one statement by
12 Congressman Bingham.

13 I would say that this Court has traditionally
14 held that one chance statement by one Congressman is not
15 valid legislative history.

16 I would say that if you look at section 11,
17 which is the criminal part of this act, which has to be
18 narrowly construed, they use the same language about
19 primary, special, and general elections, and I would
20 submit that that would not -- that they didn't use that
21 language differently in two different places.

22 QUESTION: Well, Mr. Getchell, what about the
23 change that Justice Breyer asked about from the conduct of
24 a primary election to holding a party convention instead?
25 Is that action subject to challenge under section 5?

1 MR. GETCHELL: That challenge, 1) may I say with
2 respect to that question that we submit that no such
3 change was made, that this --

4 QUESTION: If there were a change, a party says,
5 okay, the statute will reach us if we exclude people under
6 the primary so we want to change to a convention system,
7 would that change be subject to challenge --

8 MR. GETCHELL: I believe --

9 QUESTION: -- in your view?

10 MR. GETCHELL: I believe that the statute that
11 permits, in the State's view, a party to call upon it to
12 conduct a primary, when that statute is changed, that is
13 subject to preclearance. I believe arguably when the
14 State acquiesces in a call for the party to actually
15 conduct the primary, that that requires preclearance.

16 When the party has a statute like we have in
17 Virginia which says, you can have a convention or a
18 primary, let us know if you want a primary, and elects to
19 make the change, I don't think the party as a party is
20 subject to preclearance, because under your traditional
21 State action case law, Blum v. Yaretsky, for example, if a
22 private actor is making private choices within a statutory
23 framework, that is -- does not trigger State action.

24 So I would say that whenever the State changes
25 its law, or when a State makes -- changes a practice,

1 that's subject to preclearance.

2 QUESTION: May I ask --

3 MR. GETCHELL: What we do is not.

4 QUESTION: May I ask you a question? Do you
5 think the case of Terry v. Adams, the Jaybird case, is
6 still good law?

7 MR. GETCHELL: I think it's good law, but I
8 think --

9 QUESTION: Well, how do you do -- and the word
10 involved there was State, in the Fifteenth Amendment. Why
11 is the word State narrower or broader in the Constitution
12 than it is in the statute which was enacted to enforce the
13 Fifteenth Amendment?

14 MR. GETCHELL: I would say that Terry v. Adams
15 and Smith v. Allwright are extremely fact-specific. I
16 would say the commentators have said that as well.

17 I would adopt Professor Weisburd's analysis,
18 which is those cases were only applicable because of the
19 pervasive State regulation. The State required that a
20 primary be conducted. It required that the party decide
21 who could vote in the primary. It was obviously in
22 complicity with the racist intentions of the Democratic
23 Party. It furthermore --

24 QUESTION: But what about the preprimary? What
25 about the Jaybird case?

1 MR. GETCHELL: That is subject to the same
2 analysis. It depends upon a pervasive State regulation of
3 the Democratic Party.

4 QUESTION: I know you cite the professor's
5 article, but which opinion that was written in that case
6 supports your analysis?

7 MR. GETCHELL: The opinions, of course, in both
8 Smith v. Allwright and in Terry v. Adams I believe were
9 plurality opinions, and basically the State action for
10 most or all of the justices noted the fact that it was a
11 one-party State, that the nomination was tantamount to
12 election. The cases clearly view that the public function
13 being delegated is the selection of public officers --

14 QUESTION: Well, would your position be
15 different in this case if Virginia was a one-party State?

16 MR. GETCHELL: If Virginia were a one-party
17 State, it would be subject to suit under the same theory
18 under the Constitution.

19 QUESTION: Would your construction --

20 MR. GETCHELL: I don't concede this act would
21 apply.

22 QUESTION: Would your construction of the Voting
23 Rights Act, the statute, be different if we only had a
24 Democratic Party over 10 percent in any election?

25 MR. GETCHELL: If you had only -- if you had the

1 same facts you had in those cases, you would get the same
2 results under the Constitution.

3 QUESTION: I'm asking about the statute.

4 MR. GETCHELL: Under specifically section 5 --

5 QUESTION: Yes.

6 MR. GETCHELL: -- of the statute?

7 If it could be shown that the party were
8 exercising its --

9 QUESTION: It's shown that there's only one
10 party that has more than 10 percent of the vote.

11 MR. GETCHELL: If it has -- if there's only one
12 party with 10 -- more than 10 percent of the vote, then
13 presumably 28 C.F.R. 51.7, the Attorney General's
14 regulation, would cover what the party's doing, because it
15 would be --

16 QUESTION: No, but would the statute cover it?

17 MR. GETCHELL: The statute does not by its terms
18 cover it unless you then view the State as the actor.

19 QUESTION: Well then, how can the regulation
20 cover it, if the statute doesn't?

21 MR. GETCHELL: You would then, under that
22 jurisprudence, have a court entitled logically to say that
23 the party was the State, and therefore the act covered it.

24 QUESTION: Well, of course. I mean, why not
25 interpret State there to mean --

1 MR. GETCHELL: Sure.

2 QUESTION: -- what State means under the
3 Constitution?

4 MR. GETCHELL: Sure. But we're --

5 QUESTION: It seems to me you would have to
6 concede that the statute would apply.

7 MR. GETCHELL: But there's no case law that says
8 that when we're engaged merely in the nomination function
9 that we're engaged in a State action. There is --

10 QUESTION: In any case, you don't take the
11 position that you have got -- that we would have to hold
12 that what you were engaging in was a primary within the
13 meaning of the statute in order to be covered. You don't
14 take that position, do you?

15 MR. GETCHELL: I take the position that we have
16 to be the State, that being involved in a primary has been
17 held by many courts to be State action, that --

18 QUESTION: Right, but you're not saying that as
19 a textual matter this has got to be a primary within --

20 MR. GETCHELL: No.

21 QUESTION: -- the meaning of this statute?

22 MR. GETCHELL: No. No.

23 QUESTION: Okay.

24 MR. GETCHELL: But I think as a practical
25 matter, that's where we end up.

1 QUESTION: And when you say, be involved in a
2 primary, a party would still be able to maintain its own
3 integrity, however kooky it may be, if it decided to pay
4 for its own primary.

5 MR. GETCHELL: Well --

6 QUESTION: If it decided, we are having a party-
7 sponsored Statewide vote, and it sets up, you know,
8 precincts in which people can come and vote. That's not
9 what you mean by a primary. You mean a State-run primary.

10 MR. GETCHELL: I mean a State-run primary.

11 Dr. Weis -- Professor Weisburd points out that
12 some States purport to have laws that require primaries,
13 require political parties to engage in primaries. He
14 points out that after your decision in Democratic Party of
15 the U.S. v. Wisconsin, and particularly footnote 31, those
16 statutes are all presumptively unconstitutional.

17 If we, as a party, want to avail ourselves of
18 the public apparatus of a primary, then we entangle
19 ourselves with the State, and the State action at least is
20 subject to preclearance, but when we merely nominate with
21 our own people in our own convention, we are not subject
22 to the prior leave of the Government.

23 It would be terribly unseemly if an organization
24 that exists to change the Government had to preclear the
25 time, place, date, and rules for its convention, even if

1 conceptually you could do that, which you can't, because a
2 convention is a law unto itself. It makes its own rules.

3 QUESTION: What would you say with reference to
4 the scope and the meaning of the defined term, voting, in
5 section 14? Voting is defined as all action necessary to
6 make a vote effective in any primary. Would you --

7 MR. GETCHELL: In any --

8 QUESTION: Would you agree that voting might
9 be -- that the voting requirement might be complied with
10 here even if State or subdivision is not?

11 MR. GETCHELL: No, Your Honor, I most vigorously
12 deny that it would be satisfied here.

13 QUESTION: So you do not think that the action
14 in question here, the \$45 fee, is within the purview of
15 the defined term, voting, in section 14?

16 MR. GETCHELL: No, sir, I do not.

17 QUESTION: Well, is that because you think a
18 delegate is not a party official?

19 MR. GETCHELL: I think it's because we're not
20 dealing with a primary, special, or general election.

21 QUESTION: Well, but you don't -- as you
22 conceded a moment ago, that's not necessarily the case for
23 statutory applicability, and doesn't -- I don't have the
24 voting definition in front of me, but doesn't it
25 include -- I guess it was in the later amendment, at least

1 in the tail end of it, voting for a party official? Isn't
2 that included within the meaning --

3 MR. GETCHELL: Voting for the party official has
4 always been in there, but that means voting in a primary,
5 because voting is a --

6 QUESTION: Well, I mean, why? Isn't -- a
7 delegate to a party convention is a party official.

8 MR. GETCHELL: Yes.

9 QUESTION: Why, therefore, doesn't the term, or
10 the definition by its terms cover voting for that
11 official?

12 MR. GETCHELL: It is anything necessary to make
13 a vote effective in a primary, special, or general
14 election, which I think has a very distinct meaning
15 that --

16 QUESTION: Yes, but you stop half-way through
17 the definition.

18 MR. GETCHELL: I don't --

19 QUESTION: Complete the definition, and you pick
20 up party official.

21 MR. GETCHELL: I agree --

22 QUESTION: And party official I presume is a
23 broader concept than merely the concept of those who, in
24 the gross sense, would be subject to a Statewide primary,
25 for example.

1 MR. GETCHELL: Party officials, particularly in
2 the South, Democratic Party officials when the act was
3 passed, were elected in primaries.

4 QUESTION: And now they're elected, it appears
5 in some cases, by convention, and I don't see anything in
6 the definition which excludes them from the definition
7 when -- insofar as it extends to party officials.

8 MR. GETCHELL: Party officials are not excluded
9 as long as they're elected in primary, special, or general
10 elections.

11 QUESTION: But the --

12 QUESTION: I still have a problem in -- the
13 defined term is that voting includes all action necessary
14 to make a vote effective, and that seems to me to cover
15 what you're talking about.

16 MR. GETCHELL: Well, what it would --

17 QUESTION: I'm not sure that you lose even if we
18 concede that this is voting. Maybe you do.

19 MR. GETCHELL: Well, the reason that I'm very
20 concerned about that point of view, Justice Kennedy, is
21 that it is not a State function to nominate, and even
22 though that conceptually, if you don't have a candidate
23 you don't make a vote effective, what is being argued for
24 by the appellants is very, very radical. It says that if
25 we nominate, then we're part of voting.

1 Now, this was an argument -- again, Professor
2 Weisburd points out this was an argument that was made by
3 commentators in the sixties following the '68 Democratic
4 Convention. There were some lower courts that seemed to
5 make nomination a public function.

6 And then he reviewed your First Amendment
7 jurisprudence, particularly in Cousins v. Wigoda and in
8 Democratic Party of the U.S. v. Wisconsin, and I would add
9 to that the Eu case, and it is perfectly -- it seems to me
10 perfectly persuasive that this Court would say that
11 everything that happens prior to an election, and the
12 involvement of State apparatus, is First Amendment private
13 activity. It is not a State function.

14 And Justice Souter, with all deference, on the
15 idea that winnowing is a State function, that is a notion
16 that comes out the Storer case, but in Virginia there is
17 no winnowing, because in California, if you ran in the
18 primary you couldn't run in the general election, and so
19 the State was at least having the mass of people claiming
20 a right to be on the ballot reduced.

21 In Virginia, if you are nominated by a
22 convention, if the nomination is by the convention, a
23 losing party can run as an independent.

24 QUESTION: Okay, well, let's take a simpler
25 tack.

1 Going back to the definition of voting again, if
2 we start with the assumption that one act which would have
3 an effect on voting in primary, special, and general
4 elections, may be the act of selecting party officials, as
5 the definition seems to say, and if, in fact, a delegate
6 here is a party official, why doesn't that alone extend
7 the act on its terms to cover the situation?

8 MR. GETCHELL: Well --

9 QUESTION: That doesn't require that the
10 election of the party official be in a primary, special,
11 or general election. It simply requires that we hold that
12 the act of electing or selecting the party official can
13 ultimately have an effect on the effectiveness of votes in
14 primary, special, or general elections. If that is the
15 case, that's enough for coverage of this practice, isn't
16 it?

17 MR. GETCHELL: I can't read the text, Justice
18 Souter, that way. I think that the text, the meaning of
19 the text is that if you make a change in a practice or
20 procedure or standard for voting --

21 QUESTION: With respect to voting.

22 MR. GETCHELL: With respect to a primary,
23 special, or general election for any number of people,
24 including State officers, that you are at least covered by
25 the text of the act.

1 QUESTION: But if we read the definition of
2 voting as I have just suggested it may be read, then you
3 lose, I take it. In other words, you can't accept that
4 reading of the term, of the definition of voting and still
5 win this case --

6 MR. GETCHELL: One of the reasons --

7 QUESTION: -- under the section 5 issue --

8 MR. GETCHELL: Well --

9 QUESTION: -- right?

10 MR. GETCHELL: -- I could, I suppose,
11 ultimately, because I would submit that if, in fact, the
12 law is that each of the 126 units in Virginia which has
13 its convention in mass meeting, which leads to up to
14 100 legislative district conventions and up to 40 State
15 Senate legislative district conventions, and in some years
16 11 congressional district conventions, and then the State
17 convention, if the rule is that before these people who
18 don't have lawyers, who don't have people to preclear with
19 the Justice Department, before these people can meet, they
20 have to first clear the time, place, and date with the
21 Justice Department --

22 QUESTION: No, we're not talking about time,
23 place, and date. We're talking about the possible
24 application of the act to a fee requirement.

25 MR. GETCHELL: You can't stop with the fee,

1 because if the fee is a practice --

2 QUESTION: Maybe we don't stop with the fee, but
3 maybe we start with the fee.

4 MR. GETCHELL: If you -- if -- well, I would
5 suggest that you should not wish to start with the fee,
6 because I believe that you --

7 QUESTION: Yes, but somebody does wish to start
8 with the fee --

9 (Laughter.)

10 QUESTION: -- and my difficulty with your
11 argument is that it seems to me quite possible, and in
12 fact even easy, to read the definition as covering this
13 particular requirement for the election of a party
14 official whose selection may have an effect on the
15 effectiveness of votes in the ultimate election.

16 And the fact that the application in this
17 instance may raise other questions about whether it
18 applies to the timing of these delegate selections and so
19 on is something to consider, but there's still the problem
20 of why, on its face, this does not apply.

21 MR. GETCHELL: The ordinary rule of construction
22 of this Court is that if you are offered an interpretation
23 of the statute which raises grave constitutional issues,
24 you will avoid it unless you are compelled to that
25 construction by the clear intent of Congress.

1 And my point is, if you start with the fee, you
2 can never stop there, because the only intellectually
3 coherent grounds for saying that the fee is covered is to
4 say that the party is engaged in State action by the mere
5 act of nominating, and therefore the whole process is
6 ultimately federalized to the same extent it would be if
7 it were State action.

8 QUESTION: Do we disregard the Attorney
9 General's rejection of that interpretation? I thought the
10 Attorney General's interpretation were, things close to
11 the election of candidates like the \$45 fee were covered
12 but things remote, like the time and the place of meeting,
13 like the formulation of the party's platform, were not
14 covered.

15 MR. GETCHELL: Actually, the amicus brief,
16 Justice Ginsburg, filed by the Government acknowledges
17 that they do contend that the time, the place, the date,
18 are all covered.

19 And remember, this is 30 years too late, it
20 seems to me, to adopt radical new interpretations ---

21 QUESTION: Where do you say they make that
22 contention?

23 MR. GETCHELL: In their amicus brief filed by
24 the Solicitor General.

25 QUESTION: Can I -- oh.

1 MR. GETCHELL: Yes, I'm sorry.

2 QUESTION: Were you finished? Were you
3 finished?

4 MR. GETCHELL: I was going to make the
5 additional point that it is too far down the road.
6 Remember, the whole purpose of section 5 was to freeze in
7 time in 1964 the practices that were potentially
8 discriminatory so that States wouldn't change them just as
9 fast as the courts struck them down.

10 Now, the remedy for section 5 is to go back to
11 where you were in 1964. Well, in 1964, the Republican
12 Party held its convention for this Senate seat in the John
13 Marshall Hotel, which is boarded up and closed, and it
14 held the next convention in the Hotel Roanoke, which is
15 something else entirely.

16 This is not the kind of statute or remedy which
17 makes any sense 30 years down the road to give an
18 unexpected interpretation to, and the interpretation would
19 now be extremely unexpected.

20 QUESTION: How long has the Attorney General's
21 regulation been on the books?

22 MR. GETCHELL: Well, the Attorney General's
23 regulation has been on the books for some period of time.
24 I don't know the exact date.

25 QUESTION: Well then, I don't know why you'd say

1 it's unexpected, because this comes right within the --

2 MR. GETCHELL: The interpretation of the
3 regulation, Justice Stevens, is what is unexpected to me.
4 The regulation on its face says --

5 QUESTION: Apparently there are 1,000 different
6 submissions that didn't find it that unexpected.

7 MR. GETCHELL: I think that the Turner appendix
8 which has been alluded to does not on its face disclose
9 that any of those submissions had to do with conventions.

10 Only one submission having to do with convention
11 rules has been brought to this Court's attention, and --

12 QUESTION: What are the other ones, the
13 Solicitor General -- you mentioned 300 that did not deal
14 with primaries.

15 MR. GETCHELL: I don't -- I've never heard that
16 number. That number's not in any of the briefs, or in the
17 record. What is before the Court are a handful of
18 documents that the Solicitor General mailed to the Court
19 and to counsel last week, or week before last. Most of
20 them have to do with the Green Party, the Republican
21 Party, and the Democratic Party in Alaska. The letter is
22 dated September 18 to the Clerk of this Court. Except for
23 the Virginia convention submission, they all have to do
24 with changes in primaries in Alaska.

25 QUESTION: Well, perhaps the Solicitor General

1 can tell us where this 300 number appears.

2 QUESTION: Are you saying, to go back for a
3 second -- let's go back 30 years, or 20 years, and you're
4 a Member of Congress, and suppose what you're concerned
5 about is that the major party, the Republicans or the
6 Democrats, say only white people can vote in our primary,
7 and that's terrible, and you want to make it illegal, and
8 probably the Constitution does.

9 And then the idea comes through, maybe what
10 they'll do is have a primary, they'll just call it a
11 convention, and they won't go into a voting machine,
12 they'll go meet somewhere. Are you saying Congress, under
13 the Fifteenth Amendment, lacks the constitutional power to
14 forbid that?

15 MR. GETCHELL: I would submit two things. One
16 is, the Fifteenth Amendment requires State action.

17 QUESTION: Yes. What they've done is, the
18 political party is simply going to go do just what they
19 did before, but they won't call it a primary because they
20 won't use a voting machine. They'll all go to a room some
21 place, anyone who wants to, and they'll raise their hands.

22 Okay, I'm saying, do you think -- is your
23 argument that Congress lacks the constitutional power to
24 do it --

25 MR. GETCHELL: For two reasons --

1 QUESTION: Forbid that, yes or --

2 MR. GETCHELL: For two reasons -- yes.

3 QUESTION: Yes, okay.

4 MR. GETCHELL: If I may elaborate, for two
5 reasons. One is that it's not a State function when you
6 have nominations, and it doesn't involve State apparatus.

7 Secondly, the preclearance of this bill is too
8 blunt, it's not finely tailored when it impinges on First
9 Amendment rights, and Congress therefore wouldn't have
10 adopted section 5 to deal with that problem.

11 QUESTION: Thank you, Mr. Getchell.

12 MR. GETCHELL: Thank you.

13 QUESTION: Ms. Karlan, you have 5 minutes.

14 REBUTTAL ARGUMENT OF PAMELA SUSAN KARLAN

15 ON BEHALF OF THE APPELLANTS

16 MS. KARLAN: Thank you, Justice Stevens.

17 I begin with one observation about what
18 Mr. Getchell has told you today, which is, he tells you
19 how the Republicans run their convention in Virginia, and
20 how much it would cost, and how it should be operated, and
21 how difficult it would be to preclear. Those issues are
22 not before this Court. The issue before this Court is
23 here on a motion to dismiss.

24 If his argument depends on what the Virginia
25 Republican Party actually does, then the appropriate

1 judgment from this Court is a reversal and remand so that
2 we can conduct discovery on what the Virginia party
3 actually does.

4 The second point I want to make is that the word
5 State is, of course, ambiguous. It depends on a
6 construction of State that draws on the Fifteenth
7 Amendment cases which the Voting Rights Act was intended
8 to enforce. It understands what State action was, which
9 is when political parties conduct their public nominating
10 function. It relies on the Department of Justice's
11 regulations, which this Court has always given great
12 deference to.

13 The third point is about freedom of association.
14 Justice Scalia, your arguments would depend -- would be
15 equally strong in the context of a primary election. If
16 the Republican Party wanted to hold a primary election
17 restricted to party members, and limit party membership to
18 white voters only, then your argument would say they have
19 that entitlement.

20 QUESTION: If they paid for it themselves, yes,
21 if it wasn't a State-run primary.

22 MS. KARLAN: That might be correct, but Your
23 Honor, the freedom of association point might be the same
24 even if they did, and this court clearly has never taken
25 that broad an approach. Moreover --

1 QUESTION: I think the freedom to associate is
2 not the freedom to have the Government pay for your
3 association. I think once you get the Government in,
4 paying for the primary, it's a different situation.

5 MS. KARLAN: That's correct.

6 Now, in this case, there is no freedom of
7 association claim, really, because if you look at the
8 Republican call for the convention contained in the Joint
9 Appendix, they allow all voters to participate. The only
10 point they make is that they have some kind of interest in
11 charging the \$45.

12 That may be so, but that interest will only be
13 trenched on by section 5 of the Voting Rights Act if the
14 Department of Justice, the United States District Court
15 for the District of Columbia, or this Court, concludes
16 that that practice of charging the \$45 has the purpose or
17 effect of discriminating on the basis of race.

18 At this point, their claim has to be that they
19 would have the right to make people pay even if that
20 excluded all black voters, or a disproportionate number of
21 black voters.

22 Again, that is the issue to be determined in
23 preclearance. They have no First Amendment right that
24 they have identified that would be trenched on by
25 requiring preclearance in this case of this fee.

1 QUESTION: I assume that a State cannot limit
2 the ballot to labor union members.

3 MS. KARLAN: That's correct.

4 QUESTION: Can a political party limit the
5 ballot to labor union members? Can you have a labor union
6 political party?

7 MS. KARLAN: That runs a primary election --

8 QUESTION: No, no primary, just as a convention.

9 MS. KARLAN: And that receives --

10 QUESTION: They say, you can't get into the
11 convention unless you are a union member.

12 MS. KARLAN: And receives a place on the ballot
13 above all other parties?

14 QUESTION: It's successful on the first
15 election, and therefore is automatically listed on the
16 ballot in later elections.

17 MS. KARLAN: I don't know, Your Honor. What I
18 do know in this case is that section 509(B) --

19 QUESTION: Why don't you know? I don't
20 understand why you -- wouldn't the same principle you're
21 announcing to us apply to that as well as to this
22 situation?

23 MS. KARLAN: I would have to know what the State
24 involvement in that political party's placement on the
25 ballot is, and I don't know what that is, Your Honor.

1 QUESTION: What is it here -- you keep saying
2 preferred position --

3 MS. KARLAN: Yes.

4 QUESTION: -- of the Republicans or the
5 Democrats. Precisely what does that consist of?

6 MS. KARLAN: Under section 24.2-613 of the
7 Virginia Code, political parties receive placement on the
8 ballot above -- lexically above all other candidates, and
9 as Mr. Bender referred, there's a function called roll-
10 off, which means as you move down the ballot, fewer and
11 fewer people are still voting, and it turns out that being
12 the number 1 candidate or number 2 candidate on a ballot
13 gives you some substantial bump-up in the number of votes
14 you receive. That's the preferential position.

15 The second preferential aspect is that the
16 parties need not show that this candidate has any
17 particular level of support, whereas any independent
18 candidate, or nonparty candidate running, must both gain a
19 percentage of the registered voters as signatories and
20 have those people spread across the Commonwealth.

21 I think the number, if you multiply it out right
22 now, is about 15,000 signatures --

23 QUESTION: Could --

24 MS. KARLAN: -- so that's more difficult as
25 well.

1 QUESTION: I didn't mean to interrupt you. Were
2 you done?

3 MS. KARLAN: No, that was the end of that.

4 QUESTION: Would you explain to me the
5 significance of the preferential treatment for purposes of
6 the act?

7 MS. KARLAN: Yes, Your Honor. We contend that
8 the Virginia Republican nomination process is pervasively
9 regulated and results in the party receiving preferential
10 treatment. The pervasive regulation --

11 QUESTION: Okay, I'll concede that, but why is
12 that necessary for your case?

13 MS. KARLAN: It's not necessary to our case. It
14 buttresses our case.

15 QUESTION: Okay.

16 MS. KARLAN: We would -- thank you.

17 JUSTICE STEVENS: Thank you. The case is
18 submitted.

19 (Whereupon, at 11:05 a.m., the case in the
20 above-entitled matter was submitted.)

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CERTIFICATION

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

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW,
AND KIMBERLY J. ENDERSON,
Appellants, v. REPUBLICAN PARTY OF
VIRGINIA, ET AL...

CASE NO. :94-203

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

BY Ann Marie Federico

(REPORTER)